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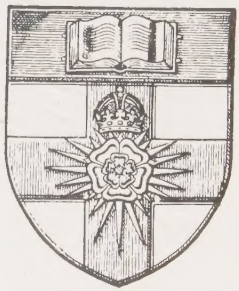

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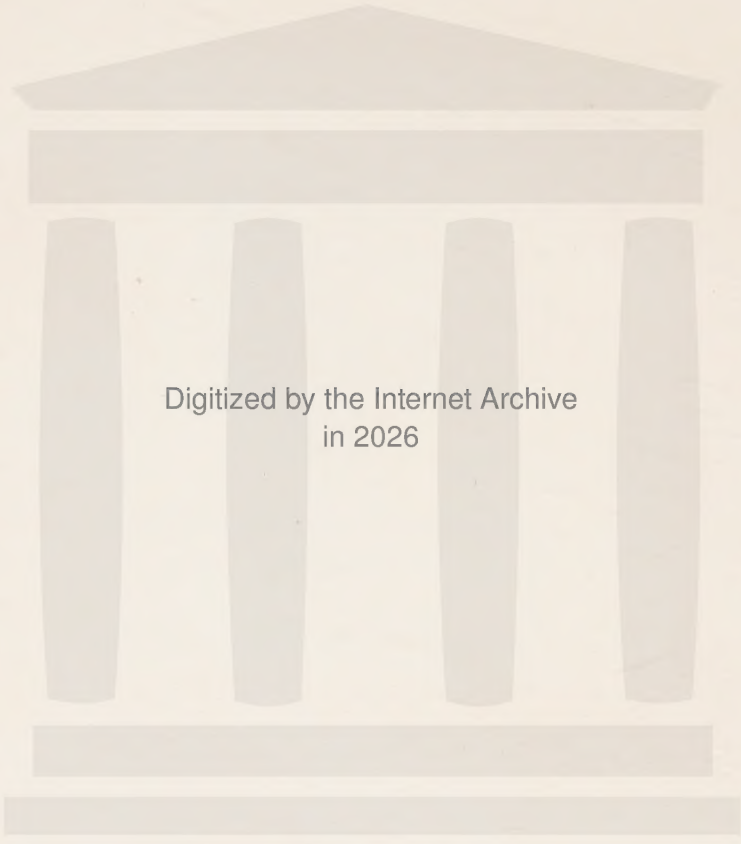

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

AUGUST 19, 1932, TO JULY 16, 1934.

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

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BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE HUMPHREYS AND MR. JUSTICE GODDARD.

RICHARD WILLIAM STARKIE.

1932.
19 *August.*

Bail—Long Vacation—Technical Case.

The existence of the Long Vacation *held*, in the circumstances, not to be a sufficient ground for granting bail to an applicant.

Application for bail.

The applicant, Richard William Starkie, was convicted on July 18 at the Central Criminal Court of using an instrument with intent to procure miscarriage and was sentenced by Roche, J., to eighteen months' imprisonment. He now made an application for bail pending the hearing of his application for leave to appeal against his conviction and sentence.

R. I. V. Rippon, for the applicant:

Owing to the existence of the Long Vacation, some considerable time must pass before the application for leave to appeal can be heard. The case is of an intricate and technical character, depending largely upon medical evidence, and the applicant should be free to consult with his legal advisers regarding it. The applicant's wife has been a householder for many years, and he has resided with her. Bail has been allowed by this Court in these analogous cases: NEWBERY AND ELMAN (1931), 23 Cr. App. R. 66; STEWART (1931), 23 Cr. App. R. 68; HARDING, TURNER AND KING (1931), 23 Cr. App. R. 143; and WAXMAN (1930), 22 Cr. App. R. 81.

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19 *August.*

RICHARD WILLIAM STARKIE.

Swift, J., Humphreys, J. Goddard, J.

[SWIFT, J.: In each of these cases the applicant had previously been of good character; but in the present case it appears that the applicant was previously convicted in 1921 of administering drugs with intent to procure abortion, and in 1929 of trafficking in noxious drugs.]

The applicant was unduly prejudiced in the present case by the disclosure of these previous cases.

SWIFT, J.: It has never been the practice of this Court to grant bail to an applicant after he has been convicted and sentenced to imprisonment unless in very exceptional circumstances. The mere fact of the existence of the Long Vacation is not of itself such an exceptional circumstance as to justify the allowing of bail. The Court finds here no exceptional circumstance, and sees no ground for interfering.

Application refused.

Solicitor: C. S. Tomlinson.

1932.
19 *August.*

JOHN PARKER.

Swift, J., Humphreys, J. Goddard, J.

JOHN PARKER.

Defence—Non-disclosure in Police Court—Comment in Summing-up on Prisoner's Silence.

Three defendants were separately charged with robbery with violence. At the police court, on being asked the usual formal questions, the first defendant replied that he reserved his defence and his evidence, but each of the other defendants disclosed his defence and his evidence, and they were all committed for trial. At the trial the Judge, in summing-up, made a statement to the effect that the defence of the first defendant, unlike those of the two other defendants, was not disclosed at the police court, so that the police had not the same opportunity of making inquiries into his case as into those of the other defendants:—*Held*, that the statement was not improper, inasmuch as, though it might not have been favourable to the first defendant, it

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19 *August.*

JOHN PARKER.

Swift, J.,
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Goddard, J.

was necessary that it should be made in fairness to the two other defendants.

NAYLOR (1932), 23 Cr. App. R. 177, and WHITEHEAD, 21 Cr. App. R. 23; [1929] 1 K. B. 99, distinguished.

Application for leave to appeal against conviction.

On April 25, 1932, Mr. Francis Neville Snook, the treasury officer of Lloyds Bank, Portsmouth, and Mr. Robert George Poor, a messenger of the bank, were taking £23,477 in notes from the bank to the post office, the money being carried by Mr. Poor in a canvas bag. A motor car was pulled up beside them from which two men alighted, one of whom violently assaulted Mr. Poor, partly blinding him, and snatched the bag. Both men then remounted the car which was rapidy driven away.

In respect of the matter John Parker, Alfred George Hinds, and John Bennett were charged with robbery with violence.

At the police court each of the three defendants was formally asked whether he wished to say anything, to call any witnesses, or to give evidence on his own behalf. Parker answered these questions in the negative, but the other two defendants disclosed their defences and called witnesses; and they were all three committed for trial.

At the trial, on July 11, 1932, at Winchester Assizes, Parker's main defence was an *alibi*, and Avory, J., in the course of his summing-up said: "Now you will remember that that this *alibi*, unlike those of the other two, was never disclosed when he was at the police court, and when he was there asked if he would give evidence or call any witnesses, he contented himself by saying that he would reserve them until the trial, and so in that way the police had no opportunity of making any inquiries into the truth of the evidence given by those witnesses."

Parker was found guilty, and was sentenced to five years' penal servitude and fifteen strokes of the cat.

1932.
19 *August.*

JOHN PARKER.

Swift, J., Humphreys, J. Goddard, J.

H. W. Wickham, for the applicant:

At the police court the applicant had a perfect right to reserve his defence and evidence, and the adverse comments upon his having taken that course made by the learned Judge in his summing-up amounted to a misdirection so serious as to call for the quashing of the conviction: NAYLOR (1932), 23 Cr. App. R. 177; WHITEHEAD, 21 Cr. App. R. 23; [1929] 1 K. B. 99. The statement that the police had no opportunity of making inquiries into the applicant's case was incorrect, inasmuch as they did in fact make such inquiries. At the trial the applicant was asked in cross-examination why he did not say that it was an absolute mistake and that he was in London on that day. The applicant in answer said "it would have been useless." The learned Judge asked "Why would it have been useless?" and on being told that he must answer the question the applicant answered: "They put me up once before for this sort of thing and it would have been useless." In consequence of these questions, the applicant's character was improperly brought out. Further, the learned Judge directed the jury that evidence had been given "that the three prisoners are acquaintances and know each other quite well," whereas no evidence had been given that the applicant knew Bennett, who, as the jury were aware, was then undergoing a sentence of imprisonment.

T. J. O'Connor, K.C., and *M. Campbell-Johnston*, for the Crown:

The cases cited are distinguishable from the present case, because in those cases it was necessary that there should be some corroboration of the evidence for the prosecution and the comments on the defendant's silence were there held to be improper because they were directed to showing that his silence amounted to corroboration; but here there was ample evidence apart from the applicant's silence to corroborate the case for the prosecution. Further,

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19 *August.*

JOHN PARKER.

Swift, J., Humphreys, J. Goddard, J.

in the present case there were two other defendants who had disclosed their defences and evidence and the Judge could not have dealt fairly with these other defendants unless he had pointed out to the jury the difference between their cases and that of the applicant in respect of disclosure.

[HUMPHREYS, J., referred to FREIGENBAUM (1919), 14 Cr. App. R. 1.]

SWIFT, J.: It is said that the statement made by Avory, J., in his summing-up in regard to disclosure of defence offends against the principle laid down in NAYLOR, 23 Cr. App. R. 177. In our view, it does not. The facts in this case are very different from those in that case. Here the Judge was dealing with the defences of three separate defendants. He was pointing out to the jury that at the police court two of them had disclosed their defences and their evidence, whereas the applicant had reserved his defence and evidence so that the police had not the same opportunity of inquiring into his case as into the cases of the other defendants. He was bound in the interest of the two other defendants to point out the difference between the cases, and there was nothing in what he said which in any way infringed the principle laid down in the authorities cited. There is no substance in this point or in any of the other points taken on behalf of the applicant, and the Court sees no ground for interfering with the conviction.

Application refused.

Solicitors for applicant: Peet & Manduell.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE HUMPHREYS AND MR. JUSTICE GODDARD.

1932.
19 *August.*

ALFRED GEORGE HINDS.

Photograph of Suspect—Exhibition to Witness before Identification—Direction to Jury on Weight of Evidence, Whether Necessary.

The fact that the Judge does not mention to the jury that the value of the evidence of identifying witnesses may possibly be in some degree lessened by their having previously picked out from a series of photographs that of the defendant does not render the summing-up inadequate.

DWYER AND FERGUSON [1924] (18 Cr. App. R. 145; [1925] 2 K. B. 799) discussed.

Appeal against conviction.

The circumstances out of which this case arose were the same as those stated in the last preceding case.

On July 11, 1932, the appellant, Alfred George Hinds, and two other men were tried together before Avory, J., and a jury at Winchester Assizes on a charge of robbery with violence.

The evidence went to show, among other things, that on April 28, 1932, a series of photographs including that of the appellant was shown to persons with a view to ascertaining whether they could identify him; that on May 2, 1932, an identification parade took place at Cannon Row police station, at which the appellant and another of the defendants were identified by witnesses who had previously seen the photographs; and that on May 10, 1932, a further identification parade was held at Portsmouth at which these defendants were again identified.

In summing-up the case to the jury Avory, J., made the following observations upon the law relating to the

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showing of photographs of a suspect to identifying witnesses: "The law, so far as it is necessary to apply it in this case, I tell you with regard to that matter is this: that there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified; but there is no suggestion in this case that anything of that kind has been done. There is no ground for suggesting that the police have in any way infringed any rule of conduct in the showing of photographs to the witnesses who have been called in this case."

On July 11, 1932, all the defendants were convicted and sentenced, the appellant being sentenced to four years' penal servitude and fifteen strokes of the cat.

The appellant gave notice of an application for leave to appeal against his conviction on the ground, *inter alia*, of misdirection by the learned Judge in telling the jury that the showing of the appellant's photographs to persons who were to be subsequently asked to identify him was not objectionable and was in order. Humphreys, J., granted the application, but only on the ground above mentioned.

G. L. Hardy, for the appellant:

The direction given by Avory, J., to the jury was not correct, for it has been laid down that it is improper to make the features of the accused familiar through a photograph to a person who is afterwards to be called as an identifying witness: see DWYER AND FERGUSON (1924),

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18 Cr. App. R. 145, 147; [1925] 2 K. B. 799. Even if the direction was correct so far as it went, it was not sufficient. The jury should have been warned that the fact that an identifying witness has previously seen a photograph of the accused person must detract from the weight of his evidence: CHADWICK (1917), 12 Cr. App. R. 247; GOSS (1923), 17 Cr. App. R. 196.

T. J. O'Connor, K.C., and *M. Campbell-Johnston*, for the Crown, were not called upon to argue.

HUMPHREYS, J.: The ground of the appeal is that Avory, J., misdirected the jury in regard to the law as to the showing of photographs to identifying witnesses. According to the transcript of the shorthand note of the proceedings, the police inspector who was in charge of the case, on being asked in cross-examination whether the witnesses were shown the photographs as they came in to make their statements at the identification parade, replied: "I don't think so. They were not shown photographs until the arrest of these men had been effected." If that statement of the facts were correct, the matter would require consideration, because there are cases such as HASLAM (1925), 19 Cr. App. R. 59, in which the Court has expressed the view that it is undesirable that photographs of a person already under arrest should be shown to witnesses just before attending an identification parade for the purpose of seeing whether they can pick out that person as the person whom they suspect. But it now appears that the statement is not correct and that the inspector said or meant to say that the witnesses were not shown photographs after the defendants had been arrested. It seems clear that the Judge at the trial took that view of the evidence. The Court must proceed upon the basis that if there was an irregularity on the part of the police it was merely in showing photographs to witnesses with the object of seeing whether they could pick out a person not

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19 *August.*

ALFRED GEORGE HINDS.

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under arrest so that he might be arrested on suspicion. Mr. Hardy is now reduced to the necessity of saying that Avory, J., misdirected the jury. We think that he directed them with perfect accuracy and in accordance with the decisions of this Court. [His Lordship read the observations from the summing-up which are set out above and continued:] The view of this Court is that that is a sufficient and correct direction. Mr. Hardy does not seriously deny that it is correct, but he submits that it should go further. He says that, seeing that certain witnesses were not only able to pick out the appellant at an identification parade, but that they had been able at an antecedent period to pick out his photograph, the Judge should have pointed out to the jury that the evidence of these witnesses was less valuable than it would otherwise have been. We do not think that anything in the case of DWYER AND FERGUSON (*supra*) made it necessary for the Judge to do that. Reliance appears to be placed upon some statements at the end of the judgment in that case, which formed no part of the actual decision. That case was quite different from the present case. There witnesses were shown separate photographs of the accused persons before being invited to identify them, and during the trial photographs of them were handed to the jury. In this case it was not necessary that the Judge should make the statement to the jury which it is said that he should have made. There was here ample evidence of identification and the jury accepted it as sufficient.

Appeal dismissed.

Solicitors for appellant: Marris & Shepherd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE GODDARD.

1932.
17 & 24 *Oct.*

ALFRED JAMES PINE.

Breach of Recognisance—Conviction Relied on by Crown as Constituting Breach — Proof — No Opportunity Given to Accused of Making Answer to Charge.

A prisoner was charged with breach of recognisance, the Crown relying on a conviction at petty sessions during the period of the recognisance as constituting the breach. Evidence was given by a police officer that he had been present on the occasion of the alleged conviction at petty sessions, but no certificate of any such conviction was produced. The accused was given an opportunity of cross-examining the police officer, but was not given any opportunity of going into the witness-box or of calling witnesses on his behalf or of making any statement in answer to the charge.

Held, it was at least doubtful whether there was any proper evidence of the conviction at petty sessions; but, apart from that consideration, the conviction must be quashed on the ground that the accused had been afforded no opportunity of giving evidence or of making any answer to the charge.

Appeal against conviction and sentence.

On June 7, 1932, the appellant was convicted at Middlesex Sessions of pavilion-breaking and was bound over on entering into a recognisance to be of good behaviour for two years. On July 26, 1932, he was convicted at the same sessions of breach of recognisance, and was sentenced by the Chairman to three years' detention in a Borstal institution.

On July 26, 1932, a detective-inspector gave evidence that on July 18, 1932, the appellant had been convicted at Acton Petty Sessions of unlawful possession of copper

1932.
17 & 24 *Oct.*

ALFRED JAMES PINE.

Hewart, L.C.J., Avory, J., Goddard, J.

wire. No certificate of any such conviction was produced. The accused was asked if he wished to put any questions to the officer and replied "No," but he was not afforded any opportunity of giving evidence himself, or of calling witnesses, or of making any statement in relation to the charge.

H. Elam, for the appellant:

The alleged breach of recognisance was not properly proved, because the conviction on which the prosecution relied as constituting the breach was not strictly proved, as required by section 18 of the Prevention of Crimes Act, 1871 (*a*). Further, the appellant had no opportunity of dealing with the alleged breach of recognisance with which he was charged. It was true that he was asked if he wished to put any questions to the officer, but he was never asked whether he wished to give evidence or make any statement in relation to the charge. [He referred to TURNER (1924), 18 Cr. App. R. 161; MASH *v.* DARLEY, [1914] 3 K. B. 1226; SMITH, 18 Cr. App. R. 170; [1925] 1 K. B. 603; BUTLER (1926), 19 Cr. App. R. 127.]

E. A. Hawke, for the Crown:

Assuming the conviction at Acton Petty Sessions was

(*a*) Prevention of Crimes Act, 1871, s. 18: "A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of conviction shall, in the case of an indictable offence, consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer. . . . The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction."

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17 & 24 *Oct.*

ALFRED JAMES PINE.

Hewart, L.C.J., Avory, J., Goddard, J.

properly proved, it is a little difficult to see what evidence the appellant could have given. There appears to be no authority that, where the prosecution rely on a conviction as constituting a breach of recognisance, that conviction must be strictly proved, provided there is before the Court satisfactory evidence that the accused has been convicted.

AVORY, J.: In this case of Alfred James Pine, who was sentenced at Middlesex Sessions to be detained for three years in a Borstal institution, the Court has had to consider whether there was sufficient or proper evidence that he had committed a breach of recognisance. It appears that he had been convicted on June 7 at the same sessions of breaking and entering a pavilion with intent to steal and placed on probation and warned that if he failed to observe the conditions of the probation he would be dealt with severely. He was brought up on July 26 before the same Court for an alleged breach of recognisance. There does not appear to have been any formal charge that he had broken the terms of the recognisance. It appears that the clerk of the Court informed the Court that he had been placed on probation on June 7 and that on July 13 he had been convicted at Acton of being in unlawful possession of property and again placed on probation, and that that was done purposely, because it was known that he would be brought to that Court for sentence.

The only evidence of any alleged breach of recognisance which was given was given by a police officer, who stated: "In this case at Acton Petty Sessions, this boy was seen carrying a sack with two other youths of seventeen, the same age as himself, carrying some scrap copper wire. They could not give a satisfactory explanation of their possession of that copper wire, and they were taken to Chiswick Police Station and charged, and eventually bound over at Acton Petty Sessions on July 13 for twelve months." No certificate of any such conviction was pro-

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ALFRED JAMES PINE.

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duced, and the police officer who was called was testifying only to what he had heard had taken place, and not to anything which he himself had observed. At the close of the evidence of the police officer the appellant was asked if he wished to ask the officer any questions and he said "No." Thereupon, without any opportunity being given to the accused of offering any explanation of what had taken place at Acton Petty Sessions or of how he came to be carrying the copper wire, or of putting forward any excuse for his conduct, assuming that he had been properly convicted, the Court proceeded to pass sentence upon him.

In our opinion, even assuming that there was any proper evidence of the conviction at Acton Petty Sessions and of the alleged breach of recognisance—which is at least doubtful—this conviction cannot stand, in view of the fact that the appellant had no opportunity of making any answer to the allegation that he had committed a breach of his recognisance. On that ground the order for detention in a Borstal institution must be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HAWKE.

CLAUDE GREGG.

1932
7 *November.*

Evidence—Sexual Offence—Corroboration Required by Statute—No Reference to Corroboration in Summing-up—Existence of Corroboration in fact—No Injustice Caused—Conviction affirmed—Children Act, 1908 (8 *Edw. 7, c.* 67), *s.* 30 (*a*)—

(*a*) Children Act, 1908, s. 30, as amended by Criminal Justice Administration Act, 1914, s. 28, sub-s. 2 : " Where, in any proceeding against any person for an offence, any child of tender

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Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 28, *sub-s.* 2.

The prisoner was convicted of indecent assault upon a young child, whose testimony was admitted without her being sworn. No reference to the statutory requirement of corroboration was made in the summing-up, nor were the jury told that it was dangerous to convict without corroboration of the child's evidence. There was in fact corroboration of the child's evidence, which consisted, for the most part, in the evidence of a slightly older child who had given evidence on oath.

Held, though the summing-up was undoubtedly defective, in view of the facts that there was corroboration of the child's unsworn evidence and that no injustice had been done by the omission in the summing-up, the conviction must be affirmed.

MURRAY (1913), 9 Cr. App. R. 248, followed.

SOUTHERN (1930), 22 Cr. App. R. 6, distinguished.

Appeal against conviction.

Appellant was convicted on September 27, 1932, at Swansea Quarter Sessions of indecent assault upon a girl of the age of seven years, and was sentenced by the Recorder to twenty months' imprisonment with hard labour.

At the trial the evidence of the girl was admitted without her being sworn. There was in fact corroboration of her evidence, consisting, for the most part, of the evidence of another girl, aged nine, who had been an eye-witness of the offence and whose evidence had been given on oath. The Recorder, in his summing-up, did not tell the jury that this was a case where corroboration of

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years who is tendered as a witness does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth . . . Provided that (a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused. . . ."

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the child's evidence was required by statute, nor did he warn them that it was dangerous to convict unless they were satisfied that her evidence was in fact corroborated.

The relevant facts of the case are set out in the judgment.

Rowe Harding, for the appellant:

The conviction should not stand, inasmuch as the Recorder entirely omitted to warn the jury that the evidence of the girl on whom the assault was alleged to have been committed required corroboration in law, and that it was dangerous to convict without corroboration. [He referred to CRATCHLEY (1913), 9 Cr. App. R. 235, and SOUTHERN (1930), 22 Cr. App. R. 6.] The present case is distinguishable from MURRAY (1913), 9 Cr. App. R. 248, because in that case there was some reference to corroboration in the summing-up, whereas here it was never present to the minds of the jury that there was any necessity for corroboration. The only evidence that could amount to corroboration was that of Joan Braunton, who was herself a child of very tender years; and just as the evidence of one accomplice cannot be corroborated by that of another accomplice, so the evidence of one child of tender years cannot be corroborated by that of another child of tender years. The jury should have been warned that the medical evidence was not corroboration, in that it did not implicate the accused. The present case is similar to DAVIES (1915), 11 Cr. App. R. 272, where at p. 274 Lord Reading, C.J., said: "It is possible that there might be a case where the corroboration is so clear and ample that the Court would not interfere with the conviction, although no such direction was given; but the Court in this case cannot come to the conclusion that with such a caution the jury would have arrived at the same verdict."

G. P. Thomas, for the Crown, was not called on to argue.

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THE LORD CHIEF JUSTICE: This appellant was found guilty at Swansea Quarter Sessions on an indictment charging him with indecently assaulting one Doreen Jones, a child under the age of sixteen. He was sentenced to twenty months' imprisonment with hard labour and now appeals against his conviction.

It is not necessary to repeat all the unpleasant facts of this case. It is enough to say that Doreen Jones was a little girl seven and a half years of age and she was not sworn; but her evidence was that one day last summer when her mother went to Ogmore she was with a little friend called Joan Braunton playing in the street together with the appellant's children; that the appellant came and spoke to her and asked her and Joan Braunton to go upstairs with him and see his children put to bed; that they went up to the bedroom, but when they got up to the landing Joan ran downstairs and she ran after her; that the appellant had spoken to Joan before Joan ran down; that Joan got out of the house, but the appellant caught hold of her (Doreen Jones) at the bottom of the stairs and put her in the kitchen; that he there put her on a chair and committed the offence, and that while this was happening she looked at the window and saw Joan looking at them. Joan Braunton gave evidence on oath and said that she was with Doreen Jones and that the appellant asked them to go into the house to see the children put to bed; that the appellant asked her something and she became frightened, went downstairs, and ran out of the house; that she saw Doreen coming downstairs and the appellant catch hold of her; that she herself ran out of the house and looked through the window; and then she described what she saw. In answer to the Recorder she said that when the appellant spoke to her she got frightened, but that she could not catch what he had asked her. Mrs. Jones, the mother of Doreen, said that she went to Ogmore in July and a fortnight after

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she came back she was bathing her little daughter and noticed that her private parts were swollen and that she had a discharge, and that there was inflammation. As the result, she had the little girl examined by a doctor. Another doctor was called, who examined the child on behalf of the police on August 18. He found her private parts swollen and inflamed with a discharge which gave evidence of gonorrhœa. Her condition was consistent with infection at the end of July. The doctor also said that he had examined the appellant himself on August 19 and again on August 20, and that the result of the first examination was negative, but the second examination showed gonorrhœa, and his condition was consistent with his having had the infection at the end of July. A doctor was called for the defence and he agreed that the appellant was suffering from gonorrhœa.

Now it is perfectly true that when one reads the summing-up there is no express direction given to the jury on the important matter of corroboration. That is undoubtedly a blemish, but the important question is, was there in fact corroboration? Our attention has been drawn to various cases of which I need to mention only two. The first is SOUTHERN (1930), 22 Cr. App. R. 6. At p. 11 Talbot, J., says: "It is too much to say, especially in view of the decisions of this Court in MURRAY (1913), 9 Cr. App. R. 248, and SCHIFF (1920), 15 Cr. App. R. 63, that it is a rule of law that if, in a case where unsworn evidence has been adduced, the Judge does not call the jury's attention to the provisions of the statute, that necessarily invalidates the conviction; but it is quite clear that the Judge ought to draw attention to it, because the jury will approach and ought to approach the question of corroboration more carefully, if they know that it is required by an express statutory provision, and not merely by the ordinary rule of common sense and fairness which makes it desirable that the evidence of young persons,

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particularly in offences of this kind, should be corroborated. It is enough to say that it is not absolutely necessary in point of law that in a case where corroboration is required by statute the provision of the statute should be expressly brought to the minds of the jury, but it is necessary that it should be impressed upon the jury that one of the matters to which they must direct their attention is the question of corroboration." In that case the conviction was quashed, and on the other side of the line there is the case of MURRAY (1913), 9 Cr. App. R. 248, where at p. 250 the Lord Chief Justice said: "If we came to the conclusion that the jury convicted the appellant on the child's evidence alone we should have no alternative but to quash the conviction. But in our view it is not a practical proposition to say that if the jury refused to believe all the other evidence they would yet have acted on the girl's evidence, when it was unsworn and uncorroborated. We must take into account what was said by the Judge, namely, that there was circumstantial evidence to corroborate the girl's story. We have come to the conclusion that there was corroborative evidence, and if the jury accepted it they could accept, and act on, the evidence of the child. We are satisfied that it was not a right direction in the circumstances, but we are also satisfied that no injustice has been done."

In our opinion, this case comes within the decision in the case of MURRAY (*supra*) and we are satisfied that, although this direction was undoubtedly defective, no injustice has been done. It follows that this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

WILLIAM BOLKIS.

1932.
21 *November*,
5 *December*.

Road Traffic — Dangerous Driving — Alternative Conditions in Relation to Prosecution—Non-performance of any of Such Conditions—Proviso Excusing Crown from Compliance in Certain Cases—Whether Applicable—Reasonable Diligence on Part of Officer in Charge of Case—Satisfaction of Court —Meaning of "Court"—Name and Address of Registered Owner of Vehicle Known to Police Within Fourteen Days —Non-performance of any of Conditions Bar to Conviction —Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 11, 21.

By the Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating to . . . dangerous driving . . . he shall not be convicted unless either (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid [relating to motor car offences] would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence: Provided that—(i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the Court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure; and (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

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In the above proviso the words " the Court " refer to the Judge and not the jury, and the words " reasonable diligence " mean reasonable diligence on the part of the officer in charge of the prosecution.

Where the officer in charge of the case has ascertained the name and address of the registered owner of the vehicle, though not of the accused, in sufficient time for a notice to be served on or sent to the owner within fourteen days of the commission of the offence, the proviso cannot apply and failure to comply with any of the alternative conditions imposed by the first part of the section becomes a bar to conviction.

Appeal against conviction.

The appellant was convicted at Gloucestershire Assizes on October 24, 1932, of driving a motor vehicle in a manner dangerous to the public contrary to section 11 of the Road Traffic Act, 1930, and was ordered by MacKinnon, J., to be bound over for two years in the sum of £5.

The alleged offence was committed on August 11, 1932. On the same day the Gloucestershire police wrote to the London County Council to obtain the name and address of the registered owner of the vehicle, and obtained the desired information on August 18. On that day the Gloucestershire police wrote to the Metropolitan police, and on August 20 an officer of the Metropolitan police interviewed the registered owner, and also interviewed the appellant. On August 25 the Gloucestershire police obtained an answer to their letter and ascertained for the first time the name and address of the appellant. No notice of the intended prosecution was served on, or sent to, either the appellant or the registered owner of the vehicle within fourteen days of the commission of the offence. On August 29 the appellant received a summons in connection with the alleged offence. MacKinnon, J., at the trial, declared himself satisfied that there had been no improper delay on the part of the Gloucestershire police. The jury, after finding the appellant guilty of the

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offence charged, added to their verdict a rider to the effect that the appellant did not know that he had knocked a mirror off an omnibus with which he was alleged to have come into contact.

Paul Layton, for the appellant:

In order to support this conviction, the Crown have to rely on the proviso to section 21 of the Road Traffic Act, 1930. The proviso, however, cannot apply in this case, because within seven days of the offence the Gloucestershire police were in a position to serve the registered owner with notice of the intended prosecution and failed to do so. The requirements of the section could have been complied with without the name of the driver of the vehicle being included in the notice.

R. C. Hutton, for the Crown:

Reliance is placed on the words "of the intended prosecution" in sub-section (c) of section 21. A distinction is to be drawn between the requirements of sub-section (a) and sub-section (c). Under sub-section (a) it is sufficient that the police officer simply gives a warning that an offence may be taken into consideration; but under sub-section (c), where the words "of the intended prosecution" are used, the police conducting the prosecution are not obliged to give notice until they have made up their minds to prosecute. The Judge has here found that the Gloucestershire police acted with reasonable diligence in making up their minds. A comparison may usefully be made between this section and section 9, sub-section 2 of the Motor Car Act, 1903 (repealed). Under the Road Traffic Act, 1930, a distinction has been drawn between the warning at the time of the accident and the notice of the intended prosecution, which did not exist under the repealed Act.

Paul Layton, in reply:

The Road Traffic Act, 1930, is a penal statute and must

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be construed strictly. The proviso cannot be read as if it contained the words "could with reasonable diligence on the part of the police after making up their minds to prosecute." *Cur. adv. vult.*

December 5.—The judgment of the Court was read by:

TALBOT, J.: In this case the appellant was convicted at the Gloucestershire Assizes before MacKinnon, J., under s. 11 of the Road Traffic Act, 1930, of driving a motor vehicle in a manner dangerous to the public. He appeals against his conviction on the ground that "the Judge at the trial was wrong in holding that section 21 of the Road Traffic Act, 1930, was not, on the admitted and proved facts, a bar to conviction under section 11 of the said Act."

[His Lordship read section 21 and continued:] The offence was committed on August 11, but the appellant did not receive the summons until August 29. No notice of the intended prosecution was served on, or sent to, either the appellant or the registered owner of the vehicle. The Gloucestershire police ascertained the name and address of the registered owner on August 18. They did not ascertain the name and address of the accused before August 25.

Therefore (1) no summons was served within fourteen days of the commission of the offence, (2) no notice of the intended prosecution was served or sent. It having been impossible to warn the driver under paragraph (a), when the offence was committed, it follows that none of the conditions which s. 21 makes necessary for a conviction was fulfilled. Unless, therefore, the proviso applies, this conviction cannot stand.

At the trial the learned Judge held (1) that the words in the proviso "the Court is satisfied" refer to the Judge and not the jury; (2) that the "reasonable diligence" mentioned in paragraph (1) of the proviso is diligence of

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the officer in charge of the prosecution, in this case the Chief Constable of Gloucestershire. It appearing that two intervals of a week each occurred between the receipt by the London County Council and the Metropolitan police respectively of inquiries necessarily or reasonably addressed to them by the Gloucestershire police and their replies thereto, the learned Judge declared himself satisfied that there had been no improper delay on the part of the Gloucestershire police. We think it is clear from the shorthand notes that in coming to this conclusion he was considering only a summons or notice to the accused.

If there were no other point in the case, we should dismiss the appeal. We agree with the Judge as to the two points on the construction of the section mentioned above; and it would be impossible to entertain any objection to his decision of fact so far as a summons or notice to the appellant is concerned; nor were we asked to do so. Another point was, however, raised on the appeal which it is not suggested is not open to the appellant, though it does not appear to have been distinctly submitted to the learned Judge. It is this: that although the name and address of the accused could not, with reasonable diligence, have been ascertained in time, there was no such difficulty about the name and address of the registered owner of the vehicle, which were in fact known to the Gloucestershire police seven days only after the commission of the offence, namely, on August 18; and there was therefore ample time for doing that which by section 21, sub-section (*c*) is enough to justify a conviction under s. 11, that is, serve on, or send by registered post to, the registered owner of the vehicle a notice of the intended prosecution.

We think that this is fatal to the conviction. None of the alternative conditions imposed by the first part of section 21 was in fact performed; one could have been performed, and not only cannot the officer in charge of

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the prosecution show that he could not with reasonable diligence have ascertained what was necessary in order to perform that one, but he had in fact ascertained it. It is not under the Act necessary to state in a notice to the registered owner the name or address of the person whom it is intended to prosecute. It is enough to state the nature, time, and place of the offence. The effect of section 21 (apart from (a) which in this case is out of the question) is this. One of three conditions must be performed if a conviction is to be good for an offence to which the section relates; but if none of them could be performed, because the relevant names and addresses could not be, with reasonable diligence, obtained in time, the failure to perform them is excused. Here the prosecution have only shown that two of the conditions could not be performed, for the reason stated, and they have therefore not excused their failure to perform any of the three.

It is unnecessary to consider paragraph (2) of the proviso, since the fact that the appellant drove on without stopping, after committing the offence (in ignorance, as the jury found, that he had done any damage) did not delay the ascertainment of the facts necessary for giving the statutory notice to the owner.

For these reasons the appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

ELIZABETH MANLEY.

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12 *December.*

Public Mischief — False Statements to Police — Complaint of Bogus Robbery—Description of Supposed Assailant.

The common law misdemeanour of effecting a public mischief, defined in HIGGINS (2 East 4, at p. 21) as comprising " all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community," is still an offence known to the law.

A person who makes a false statement to the police, in which he represents himself as the victim of an imaginary robbery and gives a description of the supposed assailant, is guilty of effecting a public mischief.

HIGGINS (1801), 2 East 4, followed and applied.

BRAILSFORD, [1905] 2 K. B. 730, and PORTER, 3 Cr. App. R. 237; [1910] 1 K. B. 369, approved.

Appeal against conviction (on certificate).

The appellant was indicted at the Central Criminal Court on November 18, 1932, for effecting a public mischief. The first count charged her that she " on the 10th day of September, 1932, in the county borough of Croydon, did by means of certain false statements, to wit that on that day a man, whose description she then gave, had hit her with his fist and taken from her handbag six 10s. notes, nine £1 notes, 15s. in silver and a receipt, cause officers of the Metropolitan Police maintained at public expense for the public benefit to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the service of the said

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public officers and rendering liege subjects of the King liable to suspicion, accusation and arrest, and in so doing did unlawfully effect a public mischief." There was a second count charging a precisely similar offence on September 15, except that there were variations in the description of the supposed attack and in the sum of money alleged to have been stolen. The appellant admitted the facts alleged against her, but it was submitted on her behalf that the indictment did not disclose any offence known to the law. The Recorder of London ruled as follows: "Upon the whole, it is my clear view that this act is one which may tend to a public mischief. It would be intolerable that the services of our police force, already hard pressed to preserve law and order in a time of increasing lawlessness, should be deflected in order to follow up charges which are entirely bogus to the knowledge of those making them. In my view, taking the times —you must consider the times in which we live—such an act may distinctly tend to the public mischief." He left it to the jury to say whether the appellant had committed the acts which formed the basis of the charge. The jury returned a verdict of "Guilty." The Recorder postponed sentence and gave a certificate to the effect that the case was a fit one for appeal.

Laurence Vine, for the appellant:

The question is whether the indictment discloses a criminal offence. The same matter has come up twice recently for consideration. At the last Hertfordshire Assizes there were two cases of which the facts were precisely similar to those of the present case, and Hawke, J., thought it best to postpone the trials till the next Assizes, by which time the point would have been considered by the Court of Criminal Appeal. There was also a similar case at the last Derbyshire Assizes, though the indictment was differently framed. Humphreys, J., there suggested

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to the grand jury that they should ignore the bill, telling them that no such offence was known to the law. The grand jury returned "No true bill."

[THE LORD CHIEF JUSTICE: In that case the indictment was framed under section 32, sub-section 1 of the Larceny Act, 1916. Humphreys, J., did not express the opinion that on the facts of the case before him a good indictment might not have been drawn for a common law misdemeanour.]

The matter of public mischief is dealt with at 2 East P. C. 821, where it is stated: "There is also another head of public cheats, indictable at common law, which are levelled against the public justice of the kingdom. Such as the doing judicial acts without authority in the name of another. . . . So all frauds affecting the Crown and the public at large are indictable, though arising out of a particular transaction or contract with the party." It is significant that the words "all frauds affecting the Crown" are used. Here there was no fraud; the appellant obtained nothing as the result of her stupid act.

[BRANSON, J.: May there not be a fraud independent of the object of the fraud? You have also to consider this aspect of the case, that she put in jeopardy anybody who corresponded with the description she gave.]

The most recent case that is at all analogous to the present is BRAILSFORD, [1905] 2 K. B. 730. The charge there was one of conspiracy to procure a passport by false representations, but the public mischief there contemplated was mischief of an international type. Here, at the highest, the appellant unnecessarily occupied some hours of a few police officers' time. A county court action for the money and time spent would have been more appropriate than criminal proceedings.

[THE LORD CHIEF JUSTICE: The question is not whether the number of people likely to be affected is large or small, but what is the nature and essence of the act.]

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He referred also to HIGGINS (1801), 2 East 4, and *Stephen's History of the Criminal Law*, Vol. III, p. 359.

L. A. Byrne, for the Crown: Two questions appear to be involved. The first is: Is there such an offence as effecting a public mischief known to the law? The answer to that is, that both from the cases and the textbooks it appears that there is such an offence. The second question is: Do the facts proved in the present case constitute the offence? It is true that such facts have not hitherto been put forward as amounting to public mischief. In DE BERENGER (1814), 3 M. & S. 67, at p. 75, it is stated "it is not necessary to constitute this an offence, that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it is prejudicial to a class of the subjects." The test whether the offence has been committed is not how many of the King's subjects are affected, but whether the act charged is calculated to tend to effect public mischief. [He referred also to PORTER, 3 Cr. App. R. 237; [1910] 1 K. B. 369, and HIGGINS (1801), 2 East 4.] The question for the jury is merely whether the acts alleged to have been done were in fact done; the tendency of the acts is a question of law for the Court. The appellant's statements caused the police to waste their time and rendered members of the public liable to be arrested.

THE LORD CHIEF JUSTICE: This appellant was indicted at the Central Criminal Court for effecting a public mischief in that she "on the 10th day of September, 1932, did by means of certain false statements, to wit that on that day a man, whose description she then gave, had hit her with his fist and taken from her handbag six 10s. notes, nine £1 notes, 15s. in silver and a receipt, cause officers of the Metropolitan Police maintained at public expense for the public benefit to devote their time and services to the investigation of false allegations, thereby temporarily

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depriving the public of the service of the said public officers and rendering liege subjects of the King liable to suspicion, accusation and arrest, and in so doing did unlawfully effect a public mischief." There was a second count which differed from the first in two respects only, one as to the date, and the other as to the amount supposed to have been taken. The appellant was convicted and was bound over to appear at the Central Criminal Court when served with notice to do so after the point of law raised had been decided. It was submitted on her behalf then, as now, that no offence had been committed and, as Mr. Byrne has observed, that proposition consists of two parts. One is the question whether it is true to-day to say that there is a misdemeanour of committing an act tending to public mischief. In our opinion, that question is to be answered in the affirmative. We think the law still remains as stated by Lawrence, J., in HIGGINS (1801), 2 East 4, at p. 21: "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community are indictable." That case was referred to with approval in a much more recent case, BRAILSFORD, [1905] 2 K. B. 730, at p. 745, and in a still more recent case, PORTER, 3 Cr. App. R. 237; [1910] 1 K. B. 369, at p. 374, where the Lord Chief Justice, Lord Alverstone, in delivering the judgment of the Court said: "We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and it is not in such a case an issue of fact on which evidence can be given."

The second point is whether the facts proved in this case constituted a public mischief. As Mr. Byrne has said, the facts here were not in dispute; it was admitted that what was alleged to have been done by the appellant had been done. We think that the conviction was right. The indictment aptly describes two at least of the ingredients of public mischief or prejudice to the community involved: the first, that officers of the Metropolitan Police were caused

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by false statements to devote their time to the investigation of idle charges; the second, that members of the public —at any rate those members who answered or were thought to answer a certain detailed description—were put in peril.

For these reasons we think that this conviction ought to stand and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellant: C. Copley Singleton, Croydon.

NOTE.—The appellant was subsequently brought up at the Central Criminal Court to receive sentence, and the Recorder of London ordered that she be bound over for two years in her own recognisances in the sum of £5.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, MR. JUSTICE BRANSON, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

BERTRAM STRINGER.

Indictment—Counts for Manslaughter and Dangerous Driving—Acquittal of Manslaughter — Conviction of Dangerous Driving—Both Charges Supported by Same Facts—Whether Verdict Bad in Law — Separate Indictments the Proper Practice in such a Case—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 11.

The appellant was charged on an indictment containing two counts, the first of which alleged manslaughter and the second the driving of a motor vehicle in a manner dangerous to the public at the same time and place. The charge of manslaughter arose from the alleged negligence of the appellant in the driving of a motor lorry, and the charge

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of dangerous driving was based upon the same facts. The jury found the appellant not guilty of manslaughter, but guilty of dangerous driving.

Held, the verdict was not bad in law as, upon the count which charged manslaughter, the appellant could not have been convicted of dangerous driving, and therefore if there had been two separate indictments tried at two separate times he could not, on the ground of his acquittal of manslaughter, have successfully put forward a plea of *autrefois acquit* to the charge of dangerous driving, because he would never have been in jeopardy on that charge. The proper procedure, however, when charges of manslaughter and dangerous driving are to be made against an accused person, is that the offences should be charged in separate indictments.

Appeal against conviction (on certificate).

The appellant was charged at Gloucestershire Assizes on an indictment containing two counts. The first charged him with manslaughter, the particulars being: "Bertram Stringer on the 5th day of October, 1932, at Cam in the county of Gloucester unlawfully killed Charles Nelmes." The second charged him with dangerous driving contrary to section 11 of the Road Traffic Act, 1930, the particulars being: "Bertram Stringer on the 5th day of October, 1932, at Cam in the county of Gloucester drove a motor vehicle on a certain road in a manner which was dangerous to the public having regard to all the circumstances of the case." He was found "Not Guilty" on the first count, but "Guilty" on the second count, and on October 26, 1932, was sentenced by MacKinnon, J., to one month's imprisonment in the second division. The Judge admitted the appellant to bail and granted a certificate that the case was one fit for appeal.

On October 5, 1932, the appellant was driving a motor lorry at Cam on the Bristol-Gloucester main road, and, at a spot where there is a bend in the road and where the road was then under repair, the appellant's lorry struck a tarring machine which was on the road and knocked

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down a roadworker named Charles Nelmes, who subsequently died from his injuries. The charge of manslaughter was based upon the alleged negligence of the appellant in the driving of the lorry and the charge of dangerous driving was based upon the same facts.

The appeal was argued on December 6 and 7, 1932, before a Court consisting of the Lord Chief Justice, Mr. Justice Avory and Mr. Justice Branson, when the arguments on behalf of the appellant and the Crown were substantially the same as those reported below. No judgment was then given, and the appeal was re-argued before a Court consisting of five Judges.

R. C. Hutton, for the appellant:

Reliance is placed on a decision of Branson, J., at Derbyshire Assizes, reported in the Law Journal newspaper of June 27, 1931, that where there has been an acquittal of manslaughter alleged to have been caused by the negligent driving of a motor vehicle there cannot be a conviction of dangerous driving under section 11 of the Road Traffic Act, 1930 (*a*), founded on the same facts. It is submitted that that view of the law is correct for two reasons. The first is that there is only one kind of *mens rea* under section 11 of the Act, and that is "recklessness" of the same kind as constitutes manslaughter, where a person is killed by negligent driving; the second is that, even if the Court holds that the two offences involve different standards of negligence, a person who commits

(*a*) Road Traffic Act, 1930, s. 11, sub-s. 1: "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable . . . (b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine."

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an offence under section 11 and thereby causes death is, on the principles laid down in BATEMAN (1925) (19 Cr. App. R. 8), guilty of manslaughter. Here the jury, having negatived manslaughter, were not entitled to convict on the lesser charge.

[AVORY, J.: If the offences had been charged in separate indictments and the accused had been acquitted of manslaughter, could he have pleaded *autrefois acquit* to the charge of dangerous driving?]

Such a plea would not have been possible, as the accused would not actually have been in jeopardy on the lesser charge.

[AVORY, J.: If there could be no plea in bar with regard to the lesser charge, what objection was there to the jury convicting on the second count? A man may be indicted for rape consisting of a series of assaults, and, after being acquitted for rape, subsequently indicted for common assault, because he has never been in jeopardy on that charge.]

[THE LORD CHIEF JUSTICE: Where reckless driving has caused death, can a charge under section 11 be preferred without any charge for manslaughter?]

Such a course would be unusual, but it would be open to the Crown to proceed on a charge of dangerous driving only.

[CHARLES, J.: May not the offences be different in their nature? There might be a case where a man had been driving dangerously for miles, and on topping a rise saw a gang of men ahead, and he might then slow down and drive on the verge in an effort to avoid them. If one of the men was killed, might not the jury acquit of manslaughter, on the ground that the driver had not displayed a reckless disregard for human life, but convict on the antecedent dangerous driving?]

There may be a case, where the prosecution are entitled to say that there are facts which, if accepted, constitute

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manslaughter, but if the jury think the accused was not guilty of manslaughter they are entitled to look further back and consider if what the accused was doing in the antecedent period constitutes the offence of dangerous driving. If, however, the negligence is carried on up to the striking of the blow, the verdict must be manslaughter or nothing. It is to be stressed in the present case that the indictment charges the second offence as having been committed at the same time and place as the first.

[BRANSON, J.: If a man is driving recklessly on the road, is he not *ex vi termini* showing reckless disregard to the safety of other people?]

Every act of criminal negligence from which death results must amount to manslaughter, and the same applies to any act which is in breach of a statute.

[HUMPHREYS, J.: If a man drives in breach of section 12 of the Road Traffic Act, 1930, and kills a person, is he guilty of manslaughter?]

He appears to be, on the language used in BATEMAN (*supra*). The case of SENIOR ([1899] 1 Q. B. 283) is of importance on this point. At p. 290 the Court for Crown Cases Reserved expressed approval of the summing-up of Wills, J., who had directed the jury that "if [the prisoner] had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated . . . death, he would be guilty of manslaughter." Only two kinds of negligence are known to the law—civil and criminal.

[Branson, J.: Your point is that the jury could not say that the appellant's negligence was criminal for the purposes of the Road Traffic Act, 1930, when they had already said that it was not criminal for the purposes of manslaughter.]

Yes. Section 11 of the Act knows only one degree of culpability—namely, "recklessness," which is one of the elements of manslaughter.

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If, however, the Court is of the opinion that the two charges were alternative so that a jury trying them together could convict of dangerous driving and acquit of manslaughter, no adequate direction was given by the Judge on the difference in the degree of negligence necessary to support the two charges. Although he took great pains to explain to the jury the degree of criminal negligence necessary to support the charge of manslaughter, he gave no direction on the degree of negligence necessary to support the charge under section 11, beyond reading the terms of the section.

W. Price, for the Crown:

The two offences charged are quite distinct and separate, and the test of the availability of a plea of *autrefois acquit* is an important one. All the cases go to show that, to support that plea, it is not enough that the set of facts relating to the two charges must be the same; the offences must be the same. If there had been two separate indictments in this case, the plea of *autrefois acquit* could not have been successfully raised in bar on arraignment for the charge of dangerous driving. BURDON (1927) (20 Cr. App. R. 80) is an authority for the proposition that on a charge of furious driving, contrary to section 35 of the Offences against the Person Act, 1861, it is not necessary to direct a jury in the terms of BATEMAN *(supra)*. The fair inference is that the Court in that case were of opinion that the degree of negligence necessary to support a charge of furious driving under that section is different from the degree necessary to support a charge of manslaughter.

[BRANSON, J.: How are you to differentiate between the degree of negligence sufficient to found a verdict of manslaughter and the degree sufficient to found a verdict under section 11?]

The two cases are quite distinct. The definition of manslaughter in BATEMAN *(supra)* involves a degree of negligence different from that involved in the offence under

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section 11. It is significant that, while that section reproduces section 1 of the Motor Car Act, 1903, in other respects, it omits the word "negligently." The Judge's direction was adequate. He twice read to the jury both the definition of manslaughter in BATEMAN (*supra*) and the actual terms of section 11. It is possible that the jury may have felt some difficulty on the charge relating to manslaughter, but they cannot have felt any difficulty on the minor charge.

R. C. Hutton replied.

THE LORD CHIEF JUSTICE: This appellant, Bertram Stringer, was charged at Gloucester Assizes upon an indictment which contained two counts; the first was that on October 5 last he unlawfully killed one Charles Nelmes, and the second count was under section 11 of the Road Traffic Act, 1930, that on that day he drove a motor vehicle in a manner dangerous to the public. The appellant was found guilty on the second count and sentenced to one month's imprisonment in the second division. The learned Judge granted the appellant a certificate that the case was a fit case for appeal, and the case has been twice heard, first of all before a Court of three Judges and now before the present Court.

The accident took place on the Bristol-Gloucester road at a spot where there is a bend in the road, and at the time of the accident that part of the road was under repair; a number of men were at work on the road and one of those men was killed by being run down by a lorry which was being driven by the appellant and was coming from the direction of Bristol. The men at work on the road were just preparing to stop for the midday meal and one of the men went to the danger flag placed in the road in order to pull it a little further into the road. As he took that step he observed a large lorry coming from the direction of Gloucester, and that lorry was going at a moderate speed. He also noticed another lorry coming

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from the direction of Bristol, and that lorry, he said, was coming at a fast speed. He put his hand above his head as a signal to stop to the Bristol lorry—that was the appellant's lorry—and one of his mates also put his hand up, but the appellant drove his lorry past them and an accident occurred when the appellant saw the lorry which was approaching him and coming from Gloucester. The appellant's lorry struck the tarring machine which was on the road and knocked down and killed a man who was with the other two. It is not necessary, I think, to enter further into the facts of the case.

It has been contended before us that the verdict of the jury in acquitting on the charge of manslaughter and convicting under section 11 of the Road Traffic Act, 1930, was a totally inconsistent verdict. We have listened with great attention to the argument of Mr. Hutton. He has also argued that the summing-up of Mr. Justice MacKinnon was insufficient. As far as the summing-up is concerned we do not think that it is open to the criticisms which have been made upon it, but with regard to these two counts it is to be observed that each count in an indictment is really a separate indictment, and it is conceded that upon the first count of this indictment, namely, the count which charged manslaughter, the appellant could not have been convicted of the offence under section 11 of the Road Traffic Act, 1930; in other words, upon the charge of manslaughter the appellant was never in jeopardy in respect of the charge under the Road Traffic Act, 1930. If there had been two separate indictments tried at two separate times he could not in reply to the charge under section 11 of the Act of 1930 have put forward successfully a plea of *autrefois acquit*.

We have come to the conclusion that the conviction must stand, but there are two observations to be added. One is that, in the opinion of the Court, it is not desirable that a charge under section 11 of the Road Traffic Act,

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1930, should be made in a count in an indictment which charges manslaughter. If the two charges are to be made, the proper practice is, in our view, that there should be two separate indictments, and if that course is followed the confusion which may conceivably have arisen here will be avoided. The second and remaining observation is with regard to the appellant's sentence. It is quite true that he appeals only against conviction, but it is to be observed that he was sentenced so long ago as October 26, and the case was in the list on November 28 and again on December 5 and 6, so that the case has been hanging over the appellant for a considerable time. In view of the special circumstances and in view not least of the fact that leave to appeal was given, we think that this sentence may properly run from the time of conviction, which means that the appellant will be discharged. That does not in the smallest degree involve the conclusion that this Court takes any lenient view of dangerous or reckless driving of motor vehicles or the causing of death by dangerous and reckless driving. I am dealing only with the particular circumstances of this present case. The form of Order will be that the sentence is altered from one month to one day, and the appellant will now be discharged.

Conviction affirmed.
Sentence reduced.

Solicitors for the Crown : Wellington & Clifford, Gloucester.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HAWKE.

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BERTRAM BEADELL.

Habitual Criminal—Statutory Notice—Allegation of Crime which Prisoner has not Admitted and of which he has not been Convicted—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 4.

In the statutory notice which must be served under section 10, sub-section 4 of the Prevention of Crime Act, 1908, upon a person whom it is intended to charge with being a habitual criminal, the prosecution are entitled to include an allegation that the accused has committed a crime, although he has neither been convicted of that crime nor admitted his guilt in respect of it.

H. JONES (1922) (16 Cr. App. R. 124) commented upon and explained.

Appeal against conviction as a habitual criminal.

On October 26, 1932, the appellant was charged at London Sessions on an indictment containing four counts charging him with obtaining money by false pretences, to which he pleaded guilty, and also containing a count charging him with being a habitual criminal, to which he pleaded not guilty. The statutory notice served on the appellant by the Director of Public Prosecutions under section 10, sub-section 4 of the Prevention of Crime Act, 1908, contained the following paragraph: "(2) . . . (d) That shortly after your last release from prison you obtained some honest employment at Clapham and purported between May and August, 1932, to make efforts to obtain other work, but you did so as a cloak to further acts of dishonesty, in that in June, 1932, you commenced at your home address

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a fraudulent business under the name of 'The True Times Services Direct Road Supply' and obtained by false pretences a deposit of £30 from one C. T. Rawlings, and you subsequently carried on this fraudulent business at 19 Harp Lane, Eastcheap, and there obtained by false pretences a deposit of £20 from one C. H. Bown. These frauds were similar in character to those involved in the charges in respect of which you are now awaiting your trial." After the accused had been given into the charge of the jury, an objection to the above particulars was taken on his behalf, on the ground that the Crown had included in them allegations of crimes of which the appellant had not been convicted, and which he had not admitted. The Deputy-Chairman upheld the objection and discharged the jury from giving a verdict. On November 3, 1932, the appellant was charged at the police court with having obtained sums of money by false pretences from persons named Rawlings, Bown and Ladd respectively, and on November 10 was committed for trial. On November 22 he was charged at the London Sessions with having obtained sums of money by false pretences from the above-named three persons respectively, and also with being a habitual criminal. He pleaded guilty to the three substantive charges, but not guilty to the charge of being a habitual criminal. The jury found him guilty on that charge, and he was sentenced by the Deputy-Chairman to three years' penal servitude and five years' preventive detention.

P. R. Hollins, for the appellant:

An objection to paragraph 2 (d) of the statutory notice based upon H. JONES (1922), 16 Cr. App. R. 124, was taken at the trial and upheld by the Deputy-Chairman, who discharged the jury from giving a verdict. It is submitted that the Crown were not entitled to include in the notice allegations of crimes which the appellant had not

admitted, and of which he had never been convicted. Having upheld the objection, the Deputy-Chairman should not have discharged the jury, but should have proceeded with the trial on the remainder of the allegations contained in the notice. [On the discretion exercised by the Deputy-Chairman in discharging the jury he referred to LEWIS (1909), 2 Cr. App. R. 180.] An endeavour by the appellant to obtain honest work since his last release was not fully dealt with in the summing-up.

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J. F. Eastwood, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at the London Sessions to certain charges of obtaining money by false pretences contained in two indictments, and was found by the jury to be a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention and he appeals against the finding that he was a habitual criminal.

The main ground of his appeal is that the trial was postponed and the first jury discharged in circumstances to which I shall refer. The appellant was first indicted on October 26 on charges of obtaining money by false pretences from four persons named Rolt, Fennell, Taylor and Smith respectively. He pleaded guilty to all four charges, but pleaded not guilty to the further charge contained in the indictment that he was a habitual criminal. The jury were summoned and the appellant was given in charge, and counsel for the appellant then took an objection to the particulars stated in paragraph 2 (d) of the statutory notice. [His Lordship read those particulars as set out above, and continued:] It was said that counsel for the prosecution was not entitled to allege the commission by the appellant of other crimes unless he had admitted those crimes or been convicted of them. Reliance was placed on the case of H. JONES (1922), 16

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Cr. App. R. 124, but, as has been pointed out, the head-note in that case is inaccurate, and the view which Mr. Hollins invited the Deputy-Chairman to take of the judgment in that case was also inaccurate. At p. 126 of the report of that case the following passage occurs: "Now the question is whether that part of these proceedings was regular, and the Court is of opinion clearly that where, in this matter of seeking to establish that an accused person is a habitual criminal, the prosecution rely upon the commission of a crime as part of the material upon which that conclusion is to be founded, then the prosecution ought to prove that the crime has been committed, and ought not to offer some evidence in relation to it to a jury which by that time *ex hypothesi* has already been informed of the prisoner's history of previous convictions." What was sought in that case was to offer evidence of association with the man who had committed the crime though the charge itself had not been proceeded with against the appellant; but, in our view, there is no objection to the prosecution proving then and there the commission of crimes with which the accused has not been charged. The Court was induced by argument based on the misconception of the case of H. JONES (*supra*) to act as it did in discharging the jury from giving a verdict and in postponing sentence. Afterwards, on November 8, the appellant was brought up at London Sessions and application was made for a further post-ponement. On November 3 the appellant had been charged at the police court and on November 10 was committed for trial on charges of obtaining money by false pretences from persons named Rawlings, Bown and Ladd respectively. On November 22 he was indicted for obtaining money by false pretences from those three persons and in the indictment there were also counts for obtaining credit by fraud and an allegation that the appellant was a habitual criminal. He pleaded guilty to all the counts which alleged false pretences but pleaded

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not guilty to the charge that he was a habitual criminal. Evidence was accordingly given and that evidence satisfied the jury.

The argument which is offered to this Court is that the learned Judge ought not to have discharged the first jury, but the learned Judge in so doing exercised his discretion and we have no power to interfere with the exercise of that discretion, which was exercised entirely in the interests of the accused.

It is further said that there was some evidence of the appellant having endeavoured to obtain work which was not put before the jury, but when one looks at the summing-up it is clear that that matter was put before the jury and after hearing the evidence the jury came to the conclusion to which they did. The whole of the argument really depends on the incorrect view of the decision in H. JONES (*supra*) which was unfortunately adopted by the Court, but the fact remains that the first jury were discharged in the interests of the appellant himself. In our view, the Deputy-Chairman ought to have proceeded with the first trial upon the particulars as they stood, the particulars not being open to the objection which was alleged.

The appeal fails, and must be dismissed, but in the exceptional circumstances of this case the time during which the appellant has been specially treated as an appellant may count towards his sentence.

Appeal dismissed.

Solicitors for the Crown : Wontner & Sons.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

GEORGE COULTHREAD.

Summing-up — Misdirection — Sexual Offence — Subsequent Complaint Referred to as Possible Corroboration.

A complaint by a person against whom a sexual offence is alleged to have been committed, though evidence of the consistency of the complainant's story, cannot be corroboration of his testimony and it is a misdirection to refer to it as such.

Proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907, applied in the circumstances of the particular case.

EVANS (1924), 18 Cr. App. R. 123, followed and applied.

Appeal against conviction and sentence.

The appellant, who was a scoutmaster, was convicted at Leeds Assizes on December 8, 1932, of indecent assault on a boy named Sydney Bullen, aged thirteen years, and was sentenced by Goddard, J., to eighteen months' imprisonment.

The following summary of facts is taken in part from the judgment:—

The boy Bullen was a boy of perfectly good character, and had expressed a desire to join the Boy Scouts. He was introduced to the appellant with that view. There was in the indictment a charge of indecent assault alleged to have been committed in May, 1932, in a room where, it was said, the appellant had made an examination of the boy on the occasion of his enrolment. The Judge, however, withdrew that charge from the jury, and the charge upon which the appellant was tried and convicted related to an

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assault alleged to have been committed on June 4, 1932, in a tent to which the boy had been taken by the appellant after the appellant had inquired whether the boy had any equipment of his own and, on being told that he had none, had said that in the circumstances they would have to sleep together. There was evidence that after the boy arrived at the camp where the tent was he was the last to go to bed in the tent, the other scouts having been already told to go to bed; that the boy was left by the camp fire with the appellant eating buns which had been given him; that then he went to bed upon a mattress on the ground 2 ft. 6 ins. in width and the appellant soon afterwards got on to the same mattress and under the same blankets; that soon afterwards some suggestion was made by the appellant that the boy should change his position, and the boy objected and said he preferred to remain as he was; that about that time one of the other boys in the tent was heard to say "What's the matter, Bullen? Are you frightened?" The boy himself gave evidence of an indecent assault committed upon him, consisting in interference with his private parts. There was evidence that on the next day the boy's private parts were in a condition which indicated that there had been interference with them, and that he showed them to certain other boys, and made complaints against the appellant; further, that one of the other boys, named Longden, who, it was alleged, had shared a bed with the appellant on some previous occasion, asked the boy Bullen on the following morning "How did you get on last night with Mr. Coulthread?" and the boy on that occasion also made a complaint against the appellant. There was evidence also that at a later date the boy made a complaint against the appellant to his uncle.

J. Willoughby Jardine, K.C. (*H. N. Grattan-Doyle* with him), for the appellant:

The Judge in his summing-up misdirected the jury in

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telling them that matters which could not be corroboration of the boy's story—namely, questions put to the boy on the morning following upon the alleged assault and complaints by him—might be corroboration. This is in direct conflict with the ruling of the Court in EVANS (1924), 18 Cr. App. R. 123, at p. 124, where it was said: "It has been pointed out again and again in these cases that evidence of a complaint by the prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter." Further, the Judge, after ruling as inadmissible evidence which was proposed to be given by a boy named Longden directed to showing that the appellant had been guilty of similar conduct with regard to him, referred to a question asked by Longden and Bullen's answer in words which must have led the jury to infer that the appellant had been guilty of such conduct with Longden or others.

G. H. B. Streatfeild, for the Crown:

It cannot be contended that a question put to the boy or a statement by the boy in the absence of the appellant could be corroboration of the boy's story. Evidence, however, which went to show that, following upon a question as to the position in which the boy was sleeping in the bed, something was happening which impelled someone to ask whether the boy was frightened, could properly be regarded as corroboration. The evidence with regard to complaints by the boy merely showed consistency of conduct, which was complete in this case. Granted that some matters were referred to by the Judge as possible corroboration which should not have been so described, this is a case where there has been no substantial miscarriage of justice.

J. Willoughby Jardine, K.C., replied.

AVORY, J.—This appellant was found guilty at Leeds Assizes on a count of an indictment which charged him with

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an indecent assault upon one Sydney Bullen, a boy of the age of thirteen years, and he was sentenced to eighteen months' imprisonment.

Mr. Willoughby Jardine has properly called the attention of the Court to the summing-up, but, before we consider the complaints made with reference to that, it is necessary to bear in mind what the general nature of the case was. [His Lordship then stated the facts as set out above, and continued:] The learned Judge properly told the jury that, in view of the nature of the offence and the age of the chief witness, it was a case where they ought not to convict unless they found corroboration of the boy's story. It was not a case where corroboration was required by statute, but one where, according to the practice laid down by this Court, having regard to the nature of the offence and the youth of the witness, the jury ought to be warned that they should look for corroboration of his evidence before they convicted. In the opinion of this Court there was corroboration of the boy's story. Apart from any observations made in the tent at the time of the offence, there was evidence that on the next day the boy's private parts were in a condition which indicated that there had been some interference with them.

It now becomes necessary to consider the criticisms directed by Mr. Willoughby Jardine against the summing-up. To pass over minute criticisms and deal with the two substantial ones which undoubtedly require consideration, the Judge referred to what had taken place on the following morning when the boys were round the camp fire and very pointedly said to the jury that, whether it was or was not Longden who had asked the question, some boy asked Bullen how he had got on with the appellant during the previous night, and Bullen replied that the appellant had behaved in an improper way. There was evidence that the patrol leader who was there treated this as a dirty joke and the Judge, commenting on the fact

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that the patrol leader had treated the matter in that way when Bullen was making a charge of that kind, said: "Did he give the boy a cuff over the head or a box on the ear for talking filthy talk and making a foul charge against the scoutmaster? Apparently not. Why? Why? You may think it was because that answer was not unexpected." That was an unfortunate observation and may well have created in the minds of the jury the impression that they might infer that the appellant had been guilty of similar conduct either with Longden or with the other boys in the camp. We think that it is to be regretted that the Judge made that observation and that it should not have been made.

The next complaint is that the Judge, having warned the jury that they should look for corroboration, said: "Members of the jury, you may find corroboration there in these things that were said, the immediate answer of the boy in the morning, and the things that were said to have been overheard—these questions in the night and in the morning and this answer in the morning." Undoubtedly that statement that the things which were said in the morning might be treated as corroboration of the boy's story is in direct conflict with the view of this Court, expressed in more than one case, that a complaint of this sort, though it may be evidence of the consistency of the complainant's story is not corroboration in the proper sense in which that word is understood in cases of this kind. We think that it was incorrect of the Judge to say that anything said on the following morning might be corroboration. On the other hand, it is not disputed by counsel for the appellant that all the boy said on the next day was evidence which showed the consistency of his story.

In the result, although we think that there were these errors in the summing-up which may properly be said to have amounted to misdirection, we have come to the conclusion that we should in this case apply the proviso to

section 4, sub-section 1 of the Criminal Appeal Act, 1907: "The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." The appeal, therefore, will be dismissed. The sentence will stand, but, as leave to appeal was given, it will run from the date of conviction.

1933.
31 *January.*

GEORGE COULTHREAD

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Appeal dismissed.

Solicitors—Walter B. Siddons, Sheffield, for the appellant; J. C. McGrath, Wakefield, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE TALBOT.

1933.
13 *February*

ALBERT DISNEY.

Indictment—Duplicity—Two Different Offences Alleged in One Count—Conviction Quashed—Night Poaching Act, 1828 (9 *Geo.* 4, *c.* 69), *s.* 1.

The appellant was found guilty of an offence against section 1 of the Night Poaching Act, 1828, the count of the indictment on which he was convicted being in the following terms: "A. D. on the 13th day of December in the year 1932 in the county of L. by night unlawfully took or destroyed game or rabbits in [certain land] or was in the said land by night with a gun net or other instrument for the purpose of unlawfully taking or destroying game or rabbits."

Held, the count was bad in law in that it alleged two different offences, and the conviction must be quashed.

MOLLOY (15 Cr. App. R. 170; [1921] 2 K. B. 364) followed and applied.

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1933.
13 *February.*

ALBERT DISNEY.

Hewart, L.C.J., Avory, J., Talbot, J.

Appeal against conviction.

The appellant was charged at Leicestershire Quarter Sessions on January 3, 1933, on an indictment containing three counts. The first count charged an offence against section 1 of the Night Poaching Act, 1828, and was in the following terms: "Albert Disney on the 18th day of December in the year 1932 in the county of Leicester by night unlawfully took or destroyed game or rabbits in land at Croxton Kerrial occupied by the Belvoir Estates, Ltd., or was in the said land by night with a gun net or other instrument for the purpose of unlawfully taking or destroying game or rabbits." Two previous convictions under section 1 of the Night Poaching Act, 1828, were then alleged. The second count charged him with by night taking or destroying game or rabbits on a public road, and the third count with between the expiration of the first hour after sunset and the beginning of the last hour before sunrise in a warren or ground then being lawfully used for the breeding and keeping of hares and rabbits killing or taking one hare and three rabbits. The appellant was found guilty on the first count, and not guilty on the second and third counts, and was sentenced by the Chairman to three years' penal servitude. The record was in the following form: "Verdict. Guilty to first count—Night Poaching."

J. P. Stimson, for the appellant:

The main ground of appeal is that the count in the indictment on which the appellant was convicted was bad either for duplicity or uncertainty, in that it charged two offences in the alternative. This was held to be objectionable in MOLLOY, 15 Cr. App. R. 170; [1921] 2 K. B. 364. Here it is quite clear that one of the offences charged can be committed apart from the other. [He was stopped.]

E. M. Ling-Mallison, for the Crown:

It is permissible to charge two offences together if they are alleged to have been committed in order to further

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ALBERT DISNEY.

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one single purpose. [He referred to JENNINGS (1844), 1 Cox 115, and Form 10 in the Appendix to the Rules under the Indictments Act, 1915.]

[THE LORD CHIEF JUSTICE: Of what do you say the appellant has been convicted?]

Night poaching, contrary to section 1 of the Night Poaching Act, 1828.

[AVORY, J.: Supposing the appellant were subsequently indicted for unlawfully taking or destroying game, could he plead *autrefois convict*? The answer would be that he may have been convicted only of being on the land by night.]

It is submitted that entering land by night armed and in fact taking a rabbit are in substance the same transaction.

THE LORD CHIEF JUSTICE: It was urged in the Court below by the learned counsel for the appellant that the first count of the indictment was bad inasmuch as it charged the appellant with two offences, and counsel referred to the well-known case of MOLLOY, 15 Cr. App. R. 170; [1921] 2 K. B. 364. The objection was overruled, but it seems to us that it was a sound objection. The count alleged two offences in the alternative, and the verdict was entered on the indictment as "Guilty to the first count." It is impossible to say of what the appellant has been convicted. We think, therefore, that this appeal ought to be allowed and this conviction quashed.

It is very unfortunate that the precedent for this count appears at p. 1392 of the 28th edition of *Archbold's Criminal Pleading*. I am told by my brother Avory that the italics which were in the old editions have been omitted, but, at any rate, as it stands, the precedent is one of a count which includes two different offences.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HORRIDGE AND MR. JUSTICE CHARLES.

1933.
20 *February.*

WILLIAM HUGHES.

Evidence—Refusal to Allow Cross-examination as to Credit—Conviction Quashed.

The legal representative of the appellant at the Court of trial was precluded from cross-examining the chief witness for the Crown, an accomplice, as to credit.

Held, the conviction must be quashed.

Appeal against conviction.

The appellant was charged at Carnarvonshire Quarter Sessions on January 6, 1933, with the larceny of a fishing-rod and with receiving the same. The jury returned a general verdict of guilty, and sentence was postponed by the Deputy-Chairman.

At the trial the principal evidence against the appellant was that of a man named Owens, who had admitted that he was a party to the stealing of the fishing-rod. In the course of the cross-examination of this witness, the solicitor who was representing the accused said "A very serious charge has been made in connection with something that happened later that week." The prosecuting solicitor objected and the Deputy-Chairman said: "It is to the interest of everyone that evidence in this case shall be confined strictly to the fishing-rod alone. What has occurred outside the fishing-rod has nothing to do with it." The defending solicitor then said: "You are ruling that I am not entitled to put any questions as to the following day," and the Deputy-Chairman replied: "You are entitled

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20 *February.*

WILLIAM HUGHES.

Hewart, L.C.J., Horridge, J., Charles, J.

to put any question as to subsequent events so long as the answers will not refer to anything outside this case."

W. Arthian Davies, for the appellant:

There were other indictments against the appellant in which he was charged jointly with the man Owens, who on this charge was the chief witness for the prosecution. It was sought by the solicitor who represented the appellant at the trial to cross-examine Owens as to credit, but the questions were disallowed by the Deputy-Chairman. It is submitted that the cross-examination should have been allowed. [He referred to the passages set out above, and also to certain portions of the summing-up.]

Christmas Humphreys, for the Crown:

Even if the solicitor who represented the defendant had been allowed to cross-examine Owens as to credit, he could not have reduced the value of his testimony below the level at which the Deputy-Chairman placed it in his summing-up, in which he referred to Owens as a man who was "not an ordinary citizen, but a man of no credit."

THE LORD CHIEF JUSTICE: This appellant was convicted at Carnarvonshire Sessions on the first count of an indictment which charged him with stealing a four-piece fishing-rod and also on the second count which charged him with receiving the same. He appeals against his conviction on various grounds, but it is sufficient to deal with one. The solicitor who represented him in the Court below was not allowed to cross-examine the principal witness for the Crown, an accomplice, as to credit. We think that that cross-examination ought to have been allowed, and that this conviction must be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1933.
27 *February.*

WILLIAM ARTHUR WILLMOTT.

Observations on Documents Sent to the Court by Applicants.

On the dismissal of an application for leave to appeal against conviction and sentence, the following observations were made by CHARLES, J.: Statements sent to the Court at the last moment may cause an application to be adjourned, and the loss of time would run against the applicant. It is well that applicants should be reminded of this matter.

WILLIAM McLAREN.

In the following case, which was an application for leave to appeal against conviction, HUMPHREYS, J., said: In this case the observations made in the last case by Charles, J., apply with added force. The applicant was convicted on January 20, and his notice of appeal was dated January 31. The notice contained five paragraphs and was in itself a very long document. On February 9 he sent in a further document of fourteen closely-written sheets which he called "further grounds of appeal." On February 23 he sent in a mass of further documents and a great many pages of further grounds of appeal. This morning there have arrived a great many more documents from the applicant and among them twelve or fourteen closely-written pages relating to the old and new grounds of appeal. In these circumstances, the Court desires me to say that this case is one in which the Court would normally adopt the course of adjourning the application, with the result that, unless

leave to appeal were given, the applicant would remain a longer time in prison than otherwise. Such a practice causes the greatest possible inconvenience. In this case, however, for special reasons, the Court does not propose to take this course. [His Lordship dealt with the facts of the case, and added:] All the documents sent in by the applicant have been considered by the Court and are totally irrelevant to the application. There is not the smallest ground for interfering with the conviction.

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27 *February.*

WILLIAM ARTHUR WILLMOTT.

Hewart, L.C.J., Charles, J., Humphreys, J.

EVAN JONES.

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EVAN JONES.

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Incest—Proof of Relationship—Admission by Father—No Other Evidence.

The appellant was convicted of incest with his daughter. The only evidence of relationship was a statement by the appellant: "G. is my daughter and I am sorry to say that I have had connection with her and I am responsible for the condition she is now in," to which he subsequently added: "I never looked on G. as my daughter, more like a sister to me. We [*i.e.*, G.'s mother and I] did not get married until five years after G. was born."

Held, there was evidence of relationship to go to the jury and the conviction should be affirmed.

Appeal against conviction and sentence (by leave of the Court).

The appellant, who was aged forty-two, was convicted at Montgomeryshire Assizes on January 20, 1933, of incest with his illegitimate daughter, Gwladys Mary Jones, aged twenty-two, and was sentenced by the Commissioner of Assize (Sir Lancelot Sanderson, K.C.) to three years' penal servitude. Gwladys Mary Jones was subsequently arraigned on a charge of incest with her father, the appellant, and pleaded guilty. She was bound over for six months in the

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sum of £10 on condition that she went into a Moral Welfare Home.

At the trial the appellant's wife declined to give evidence against the appellant, and the only evidence on which the Crown could rely to prove the relationship of father and daughter was that of a police officer, who said that when he visited the appellant's house the appellant volunteered the statement "This is a terrible business," and that after being cautioned the appellant made a further statement, including the following passage: "Gwladys is my daughter and I am sorry to say that I have had connection with her, and I am responsible for the condition she is now in. Signed, Evan Jones. Statement was read over to me in the presence of my wife, my son and daughter and P.S. Hughes"; and that subsequently, as he (the police sergeant) was leaving the house, the appellant took him into the kitchen and made the following further statement: "I have never looked on Gwladys as my daughter, more like a sister to me. We [*i.e.*, Gwladys's mother and I] did not get married until five years after Gwladys was born."

Francis Williams, for the appellant:

There was no sufficient proof of relationship. The daughter was born five years before the appellant married, and there was, accordingly, no presumption of legitimacy. The only evidence against the appellant was contained in his own admission, which was immediately qualified. The appellant's statement was at the highest not proof of the truth of the facts to which it related, but only of his own belief about those facts.

George Bankes, for the Crown:

It is important to remember that in this case the appellant did not seek to appeal against his conviction, and has never denied that Gwladys was his daughter. On the contrary, in his notice of appeal he stated "I admit my offence." The appellant definitely stated that Gwladys

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was his daughter, and the only qualification he added related to the manner in which he had treated her. The jury were entitled to believe the appellant when he said that Gwladys was his daughter. There was clearly evidence to go to the jury:

[HUMPHREYS, J.: In a case of bigamy, suppose the only evidence of the lawful marriage was that the prisoner had said "I was married to so-and-so and she was alive when I went through the ceremony with the second woman," would that be sufficient evidence to prove the first marriage?]

It would be some evidence to go to the jury of the fact of the marriage.

Francis Williams replied.

THE LORD CHIEF JUSTICE: This unpleasant case has been extremely well argued on both sides and we have carefully considered our conclusion. The appellant was charged before the learned Commissioner of Assize at Welshpool upon an indictment which alleged that he had committed incest with his daughter Gwladys. He pleaded "Not Guilty," but was convicted and sentenced to three years' penal servitude. In his notice of appeal, he asked for leave to appeal against sentence only, crossing out the words "conviction and." Leave to appeal against both conviction and sentence was granted to him, and the whole matter has now been fully argued.

The appellant is forty-two years of age and his daughter is twenty-two. To pass over immaterial facts, on November 25, 1932, a police sergeant saw the appellant, and the appellant began by saying: "This is a terrible business." He was then cautioned and in the presence of his wife, his daughter Gwladys and the police sergeant, made a statement in the course of which he said that Gwladys was his daughter and he was responsible for her condition. That statement was written in English and

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was signed by the appellant. Afterwards, when the police sergeant was leaving the house, the appellant followed him out and took him into the kitchen and there said: "I have never looked on Gwladys as my daughter, more like a sister to me," and he added: "We did not get married until five years after Gwladys was born." The mother did not wish to give evidence and therefore the only evidence that the girl was the appellant's daughter was his own admission. Now it is to be observed that at no stage in these proceedings did he allege the contrary. He did not seek to appeal against his conviction, and has never denied that he was the father of Gwladys Jones. On the contrary, if the jury accepted the evidence of the police sergeant, he said that he was her father.

We have paid attention to everything which Mr. Francis Williams has said on behalf of the appellant, and to everything which Mr. Bankes has said on behalf of the Crown, and we have come to the conclusion that there was in this case evidence to go to the jury. With regard to the summing-up, it was, in our opinion, unexceptionable. We think, therefore, that this appeal must be dismissed, but, inasmuch as leave to appeal was given, the time during which the appellant has been specially treated as an appellant will be counted towards his sentence.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE GODDARD.

CHARLES A'COURT BEADON.

1933.
6 *March.*

Alien—Burden of Proof—Inadmissible Document Received in Evidence — Conviction Quashed — Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 4—*Aliens Order*, 1920 (*S. R. & O.*, 1920, *No.* 448, *as amended by No.* 2262), *Art.* 6, *para.* 1 (a).

At the trial of the appellant, who was a British subject by birth, for an offence against Art. 6, paragraph 1 (a) of the Aliens Order, 1920, and for making an untrue statement for the purpose of procuring a passport, the prosecution endeavoured to prove by means of a photostatic copy of a certificate of naturalization authenticated by the seal of the United States of America that the appellant had lost his British nationality. The appellant was convicted on both charges, and on appeal it was conceded by the Crown that the document ought not to have been admitted in evidence, inasmuch as the mode of authenticating the document did not fulfil the requirements of section 7 of the Evidence Act, 1851.

Held, though the prosecution might have proceeded at the trial on the basis that under section 1, sub-section 4 of the Aliens Restriction Act, 1914 (*a*), the burden of proving that he was not an alien lay on the appellant, they had not taken this course, but had themselves accepted the burden of proof and endeavoured to discharge it by putting in evidence an inadmissible document, and accordingly the conviction must be quashed.

Appeal against conviction and sentence.

The appellant was charged at the Central Criminal

(*a*) Aliens Restriction Act, 1914, s. 1, sub-s. 4: "If any question arises on any proceedings under any order [made under this Act], or with reference to anything done or proposed to be done under any such order, whether any person is an alien or not, or is an alien of a particular class or not, the onus of proving that that person is not an alien, or, as the case may be, is not an alien of that class, shall lie upon that person."

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CHARLES A'COURT BEADON.

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Court on February 7, 1933, on an indictment containing two counts. The first charged him that he, between December 8, 1928, and August 17, 1932, being an alien, failed to furnish to the registration officer of the district in which he was then residing particulars required by Art. 6, paragraph 1 (a) of the Aliens Order, 1920 (*b*); and the second, that he on December 17, 1930, made a statement which was to his knowledge untrue for the purpose of procuring a passport for himself, namely, a statement that he had not lost the status of a British subject. He was found guilty on both counts, and was sentenced by the Commissioner to three months' imprisonment and recommended for deportation.

It was not disputed that the appellant was born in India of British parents, and therefore was a British subject originally, but the case for the Crown was that he had become naturalized in the United States of America on June 6, 1922. The Crown sought to adduce in evidence a photostatic copy of an American certificate of naturalization, and objection was taken on behalf of the accused that the Crown had failed to comply with section 7 of the Evidence Act, 1851, in that, although the document was authenticated by the Seal of the United States of America, nevertheless the copy did not purport to be sealed with the seal of a Court or to be signed by a Judge. The Commissioner overruled the objection and admitted the document. The accused did not give evidence at the trial.

St. J. Micklethwait, K.C. (*Stephen Benson* with him) for the appellant:

This appeal raises a question of general importance as

(*b*) Aliens Order, 1920, Art. 6, para. 1: "An alien shall comply with the following requirements as to registration:—(a) he shall as soon as may be furnish to the registration officer of the registration district in which he is resident particulars as to the matters set out in the first schedule to this order. . . ."

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to the proof of a foreign document. The contention for the appellant is that a photostatic copy of an American certificate of naturalization was improperly received in evidence.

[*The Solicitor-General* (*Sir Boyd Merriman, K.C.*): The Crown will not seek to contend that the document referred to was properly admitted at the trial, but will rely on the point that, the defendant having been alleged to be an alien, the onus was on him to prove that he was not an alien, by reason of section 1, sub-section 4 of the Aliens Restriction Act, 1914 (*a*), and that he failed to discharge that onus.]

It was common ground that the appellant was born in India of British parents, and the appellant discharged the onus that lay upon him by proving that he was a British subject at birth. There was no proper evidence that he had ever lost that status.

The Solicitor-General (*Sir Boyd-Merriman, K.C.*) (*L. A. Byrne* with him), for the Crown:

It it submitted that the conviction ought to be affirmed. The words of section 1, sub-section 4 of the Aliens Restriction Act, 1914, are quite plain and imperative. A question had here arisen under Art. 6, paragraph 1 of the Aliens Order, 1920—namely, whether the appellant had complied with the Order—and therefore section 1, sub-section 4 of the Act of 1914 applied. The appellant could have gone into the witness-box at the trial and proved that he was a British subject and had never lost that status. It is by no means unknown to the law for the whole onus of disproving the commission of offences to be thrown upon a defendant, *e.g.*, under the Licensing Acts. The appellant did not disprove the allegation that he was an alien merely by showing that he was a British subject many years ago. [He referred to KAKELO (1923), 17 Cr. App. R. 149; [1923] 2 K. B. 793; 87 J. P. 184.] Although the Commissioner admitted in evidence an inadmissible document, the case

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for the Crown did not depend upon that document, and the Court is invited to apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907.

St. J. Micklethwait replied.

THE LORD CHIEF JUSTICE: This appellant was charged at the Central Criminal Court upon an indictment containing two counts. The first count charged him with failing to furnish particulars, contrary to the Aliens Restriction Acts, 1914 and 1919, and Orders made in pursuance thereof; the second count charged him with making an untrue statement for the purpose of procuring a passport, contrary to section 36, sub-section 1 of the Criminal Justice Act, 1925. He was found guilty on both counts and was sentenced to three months' imprisonment and recommended for deportation. He now appeals against both conviction and sentence.

It is common ground that the appellant was born in India, that his parents were British subjects and that he himself was originally a British subject, but it was said by the prosecution that he was naturalized in the United States of America on June 6, 1922, and reliance was placed throughout on a document which was said to be a certificate in proper form to prove that the appellant was an alien; in other words, the onus was accepted by the prosecution and in this way the case was left to the jury.

Now, no doubt, under section 1 of the Aliens Restriction Act, 1914, it is provided: "If any question arises on any proceedings under any Order [made under this Act], or with reference to anything done or proposed to be done under any such order, whether any person is an alien or not, or is an alien of a particular class or not, the onus of proving that that person is not an alien, or, as the case may be, is not an alien of that class, shall lie upon that person," and it may well be that the case could have been conducted in that way, but the case was not so

conducted. It was conducted upon the basis of a document now very frankly admitted by the Solicitor-General not to have been evidence. In those circumstances, it seems to this Court that it is impossible to apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907, and to say that nevertheless the burden of proof was on the appellant to show that he was not an alien. We see no alternative but to allow the appeal and quash the conviction.

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CHARLES A'COURT BEADON.

Hewart, L.C.J., Humphreys, J., Goddard, J.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

CHARLES WILMOT.

1933.
1 & 2 *May.*

Indictment—Duplicity—Driving Motor Car Recklessly or at a Speed or in a Manner Dangerous to the Public—Point not Taken till after Verdict—Conviction Quashed—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 11, *sub-s.* 1.

The appellant was convicted on a count in an indictment which charged him with driving a motor vehicle in a manner dangerous to the public, contrary to section 11, sub-section 1 of the Road Traffic Act, 1930. The Particulars of Offence alleged that he " drove a motor car recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case. . . ." No objection to the indictment was taken until after verdict.

Held, the count was bad for duplicity and the conviction must be quashed.

MOLLOY (15 Cr. App. R. 170; [1921] 2 K. B. 364), SURREY JUSTICES, *Ex p.* WITHERICK ([1932] 1 K. B. 450), and DISNEY (24 Cr. App. R. 49; [1933] W. N. 60) followed and applied.

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1 & 2 *May*.

CHARLES WILMOT.

Hewart, L.C.J., Avory, J., Humphreys, J.

Appeal against conviction.

The appellant was charged at Nottinghamshire Assizes before Macnaghten, J., on an indictment containing three counts. The first charged him with causing bodily harm, contrary to section 35 of the Offences against the Person Act, 1861, and the second with driving a motor vehicle when under the influence of drink or drugs, contrary to section 15 of the Road Traffic Act, 1930. On these two counts he was acquitted. The third count, on which he was convicted, was in the following terms: "Statement of Offence.—Driving motor vehicle in a manner dangerous to the public, contrary to section 11, sub-section 1 of the Road Traffic Act, 1930. Particulars of Offence.—Charles Wilmot, on the 25th day of October, 1932, on a certain road called Legsby Avenue, in the Borough of Grimsby in the County of Lincoln, drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road." On February 22, 1933, he was sentenced to two months' imprisonment in the second division, but was admitted to bail, pending appeal.

The appellant was represented by counsel at the trial, but no objection to the indictment was taken until after verdict.

P. E. Sandlands, for the appellant:

The indictment and conviction were bad for uncertainty or duplicity.

[AVORY, J.: Is it open to you to take this point now after judgment?]

Yes. In MOLLOY (15 Cr. App. R. 170; [1921] 2 K. B. 364) no point as to the duplicity of the indictment was taken at the trial, yet the Court of Criminal Appeal held

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that the conviction must be quashed on the ground that the indictment was bad for duplicity. The very point which is at issue in this case was decided in WELLS ((1904), 91 L. T. 98). There it was held that a conviction of driving a motor car on a public highway "at a speed or in a manner" dangerous to the public was bad. The charge in that case was framed under section 1 of the Motor Car Act, 1903 (repealed), the language of which was virtually identical with that of section 11, sub-section 1 of the Road Traffic Act, 1930 (*a*), except that the repealed statute contained the additional words "or negligently." That decision has been cited with approval in numerous cases, the most recent being SURREY JUSTICES, *Ex p.* WITHERICK ([1932] 1 K. B. 450). The principles underlying the decision have not been affected by the Indictments Act, 1915. The powers of amendment conferred by section 5, sub-section 1 do not apply to a case where different offences are charged in the same count. The only case in which a doubt was expressed as to the powers of the Court of Criminal Appeal to entertain after verdict an objection that an indictment is bad on its face is J. A. THOMPSON (9 Cr. App. R. 252; [1914] 2 K. B. 99). There Isaacs, C.J., said: "We are of opinion that, there being a defect on the face of the indictment, the objection should, in strictness, be taken before plea, and, therefore, the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent

(*a*) Road Traffic Act, 1930, s. 11, sub-s. 1: "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable . . . (b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine."

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the defence raising any objection based on an irregularity or defect in the proceedings at any time. We do not, therefore, decide that the objection may not be taken at a later period and even after verdict." The doubt expressed in that case was set at rest by the decision in MOLLOY (*supra*).

[AVORY, J.: Is not the position this, that, although in these circumstances no motion in arrest of judgment could have been made, the point would, under the old practice, have been open on a writ of error?]

Yes. Not merely the indictment, but the conviction which must follow the terms of the indictment is bad, and the point as to the invalidity of the indictment can be taken before the Court of Criminal Appeal. It is the duty of the prosecution rather than of the defence to see that there is no invalidity in the indictment. [He referred also to DISNEY (24 Cr. App. R. 49; [1933] W. N. 60), and COTTERILL *v.* LEMPRIERE ((1890), 24 Q. B. D. 634).]

A. M. Lyons, K.C., for the Crown:

The point that the indictment was bad on its face cannot now be taken. It could have been taken at an earlier stage in the proceedings, as the indictment was read over to the accused before he pleaded and was referred to more than once in the summing-up. If the point had been then taken and had been considered by the Court to be well-founded, the difficulty could then have been met. If the argument for the appellant is right, counsel may refrain from taking a point at the trial and keep it in reserve for the Court of Criminal Appeal. It is submitted that the third count in this indictment falls in a different category from that which includes the counts held to be objectionable in MOLLOY (*supra*) and in DISNEY (*supra*). This appears from an examination of the phraseology of the statute which was followed in drafting the count.

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[THE LORD CHIEF JUSTICE: Is it or is it not true to say that in this count more than one offence is referred to?]

The count refers to different methods of managing a motor car. There could have been no question of the accused being embarrassed in his defence.

[AVORY, J.: All the authorities show that if a man has been convicted of offences in the alternative he cannot effectually plead *autrefois convict.*]

[Counsel also referred to JONES, *Ex p.* THOMAS ([1921] 1 K. B. 632).]

THE LORD CHIEF JUSTICE: This appellant was indicted at Nottinghamshire Assizes on an indictment containing three counts. On the first two he was found Not Guilty, but he was convicted on the third count and it is important to examine the language of that count. [His Lordship referred to the Statement of Offence and Particulars of Offence as set out above, and continued:] Unfortunately, *per incuriam*, no objection was taken to the indictment at the trial and the indictment went to the jury in the form which I have read. Indeed, it appears from the shorthand note that when the jury were retiring the actual indictment was handed to them in order that they might read it for themselves. The argument of Mr. Sandlands on behalf of the appellant is that this count is bad for duplicity and the importance of the matter is expressed, for example, by Avory, J., in SURREY JUSTICES, *Ex p.* WITHERICK ([1932] 1 K. B. 450, at p. 452): "It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad." Then follow these important words: "It is an elementary principle that

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an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict.*"

There is a mass of authority to that effect, and with regard to the remaining contention which has been urged by Mr. Lyons on behalf of the Crown—namely, that, as this point was not taken at the trial, it cannot be taken now—it is enough to refer to the judgment of this Court in MOLLOY (15 Cr. App. R. 170; [1921] 2 K. B. 364, at p. 369), where it is said: "In these circumstances, although the point was not taken by the appellant at the trial, we must, now that the point is taken, decide it according to law, and in our opinion the appeal must be allowed and the conviction quashed." It is to be observed that the words are not "we may," but "we must"; the matter is there stated as being a duty on this Court in the interests of justice. Although in the present case the appellant was represented by counsel, there are many cases in which an accused person has had no counsel, and nevertheless this Court may have the duty of taking a point of law which, if it had been present to the minds of those in the Court below, could have been, but was in fact not, taken.

The only other case to which I need refer is DISNEY (24 Cr. App. R. 49; [1933] W. N. 60). In that case, it is fair to add, the point was taken in the Court below, but was overruled. The point in the present case could not have been raised on a motion in arrest of judgment, because, as appears from the shorthand note, it was not mentioned until after judgment had been delivered; but if writs of error had still been in existence, it might have been raised upon a writ of error. The Criminal Appeal Act, 1907, abolished writs of error, and therefore it is left to this Court to do that which in earlier days might have been done by a writ of error. In these circumstances it

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seems to be clear that this appeal must be allowed and this conviction quashed.

Conviction quashed.

Solicitors—H. K. & H. S. Bloomer, Grimsby, for appellant; the Town Clerk, Grimsby, for the Crown.

NOTE ON DUPLICITY OF INDICTMENTS.—In R. *v.* OTTAWAY, May 16, 1933, at Bucks Summer Assizes, the prisoner was indicted as follows: "First Count. Statement of Offence. Shooting with intent to murder, contrary to section 14 of the Offences against the Person Act, 1861. Particulars of Offence. Ronald Sidney Ottaway on the 27th day of March 1933 in the County of Buckingham shot at Albert Howlett with intent to murder him. Second Count. Statement of Offence. Shooting with intent, contrary to section 18 of the Offences against the Person Act, 1861. Particulars of Offence. Ronald Sidney Ottaway on the 27th day of March 1933 in the County of Buckingham shot at Albert Howlett with intent to do him grievous bodily harm or to maim disfigure or disable him or to resist the lawful apprehension of the said Ronald Sidney Ottaway." The prisoner pleaded "Not Guilty" to the first count, and Finlay, J., intimated that in his view the second count was bad for duplicity. Counsel for the prosecution then applied for leave to amend that count by striking out the words "to do him grievous bodily harm or to maim disfigure or disable him or" and the Judge granted this. The prisoner then pleaded "Guilty" to the second count as amended, and was sentenced on this count to two years' imprisonment, and to concurrent terms of eighteen months' and twelve months' imprisonment on two other indictments to which he also pleaded "Guilty."

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SARAH PURCY.

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Obstructing Coroner in Execution of Duty—Concealment of Baby's Dead Body—Death Due to Natural Causes—No Duty to Hold Inquest—Conviction Quashed.

The appellants, F. P., and J. P., who were husband and wife, and S. P., their daughter, were convicted of obstructing a coroner in the execution of his duty. It was proved that a baby, which had been born to S. P., had died when about three months old; that, on their own admissions, F. P. and J. P. had concealed the dead body in a hedge and S. P. had seen her parents take the body away and return without it. There was evidence that the baby had suffered from a bad cough for some time, and a medical witness, who made a post-mortem examination, stated that death was due to natural causes.

Held, the foundation of the charge was that the case was one in which there was a duty on the part of a coroner to hold an inquest, but that in the present case the evidence did not establish that there was any such duty; and, further, even if the prosecution had established that, there was no evidence that the appellants or any of them intended to obstruct the coroner in the holding of an inquest. The convictions must, accordingly, be quashed.

Appeals against conviction.

The appellants were convicted at Northamptonshire Quarter Sessions on April 6, 1933, of obstructing a coroner in the execution of his duty, and were sentenced by the Deputy-Chairman as follows: Frederick Purcy, to three months' imprisonment with hard labour; Jane Purcy, to three months' imprisonment with hard labour; and Sarah Purcy, to be detained in an institution for mental defectives. The Particulars of Offence were in the following terms: "Frederick Purcy, Jane Purcy and Sarah Purcy on a day between the 2nd day of February and the 16th day of February, 1933, in the County of Northampton, intending to prevent the Coroner of the Mid Division of Northamptonshire from holding an inquest in the execution

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of his duty upon view of the dead body of Albert Walter Purcy who died a violent or an unnatural death or a sudden death of which the cause was unknown or intending to obstruct the said coroner in the holding of such inquest did conceal the said body in a hedge bottom in Doddington Fields in the County of Northampton."

On November 3, 1932, a male child was born to the prisoner Sarah Purcy. On January 9, 1933, the Purcy family, including this baby, were admitted to a common lodging-house at St. Albans "in a deplorable condition" and stayed there five days. It was observed that the baby had a bad cough. On January 16 the family were admitted to a common lodging-house at Bedford, and the baby then appeared to have whooping-cough. On February 2 the family were seen tramping along a road at Irchester, and it was then observed that the baby had a nasty cough and looked ill. On the same evening the family, without the baby, were admitted to a common lodging-house at Wellingborough. On February 16 the body of the dead baby was found in a hedge wrapped in a bundle of clothes. A medical witness, who made a post-mortem examination of the body, stated that the cause of death was broncho-pneumonia accelerated by lack of attention, and that the baby died from natural causes. The male prisoner made a statement when interviewed by the police in the course of which he said: "The baby died in the pram. Not knowing what to do with it my wife wrapped it up in a black openwork shawl and we went together and laid it in a hedge bottom in a rough lane. It was stiff when we put it there. I thought it died of a fit."

Sarah Purcy, in the course of a statement, said: "I was near the baby when it had a fit of coughing and died. I saw my mother and dad take it up a lane but they did not bring it back." Jane Purcy subsequently admitted having assisted her husband in putting the body in the hedge.

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R. E. Manningham-Buller, for the appellants:

It is a condition precedent to a charge of this kind that there should be a coroner whose duty or right it is to hold an inquest. There was no such duty or right on the part of the coroner in this case. Under section 3 of the Coroners Act, 1887, a coroner can hold an inquest only where there is reasonable cause to suspect "a violent or an unnatural death or a sudden death of which the cause is unknown or where there has been a death in prison or where an inquest is required by Act of Parliament." Here there was evidence that the baby had been ill for some time, and there was no evidence upon which any coroner would have had grounds for such suspicion or that any of the defendants did anything with the intention of obstructing the holding of an inquest. In PRICE ((1884), 12 Q. B. D. 247) and STEPHENSON AND ANOTHER ((1884), 13 Q. B. D. 331) there was evidence of the burning of the body after notice had been given to the accused that an inquest was to be held. In BYERS ((1907), 71 J. P. 205) the defendant had undertaken the custody of children and was under a duty to report the death of any child under her care within twenty-four hours. [He referred also to certain passages in the summing-up.]

P. E. Sandlands, for the Crown:

The case was opened on behalf of the prosecution on the basis that the jury would be asked to infer that the prisoners were acting with the intention of obstructing a coroner. Until the post-mortem was held, the cause of death was unknown, and the jury might infer that this was one of those cases in which a coroner would hold an inquest. The jury were invited to express their view on what object the prisoners had in concealing the body, and there was evidence on which they could come to the conclusion to which they came.

R. E. Manningham-Buller replied.

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THE LORD CHIEF JUSTICE: I need not repeat the facts of this case, which have been very clearly stated by Mr. Manningham-Buller and Mr. Sandlands. The foundation of a charge such as this must be that the case is one in which there is a duty to hold an inquest. In our opinion, it is by no means established by the evidence that this was a case in which there was a duty to hold an inquest; but even if that be not so and even if that point had been made good by the prosecution, there was no evidence that these appellants or any of them intended to obstruct the coroner in the holding of the inquest. The way in which the case was left to the jury was by no means satisfactory. The Deputy-Chairman said: "You have to say whether, when all the facts are considered, you think these people have been proved guilty. If you consider they knew the nature of their act then it is certainly your duty to find them guilty." What was "the nature of their act"? It was that they put this infant in the bottom of a hedge, so that there is a clear direction that if the appellants knew what they were about in putting the body where they did put it, they ought to be found guilty. In our opinion, that direction was quite erroneous and there was no evidence on which the appellants or any of them could properly be convicted. The appeals are allowed and the convictions quashed.

Convictions quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

GERMAINE LARSONNEUR.

1933.
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Alien — Charge of being "found in the United Kingdom" after Leave to Land Refused — Endorsement on Passport Requiring Departure from United Kingdom—Departure to Irish Free State—Order for Deportation from Irish Free State—Return to United Kingdom in Custody of Irish Free State Police—Detention by Police of United Kingdom—Aliens Order, 1920, *Arts.* 1 (3) (g), (4), *and* 18 (1) (b), *as amended.*

A French subject was permitted to land in the United Kingdom subject to certain conditions endorsed on her passport. These conditions were subsequently varied by a condition requiring her to depart from the United Kingdom not later than a certain date. On that date she went to the Irish Free State. An order for her deportation from the Irish Free State was made by the executive authorities of that country, and she was subsequently brought back to Holyhead in the custody of the Irish Free State police, who there handed her over to the police of the United Kingdom, by whom she was detained. She was convicted on a charge that she "being an alien to whom leave to land in the United Kingdom has been refused was found in the United Kingdom," contrary to Arts. 1 (3) (g) and 18 (1) (b) of the Aliens Order, 1920, as amended (*a*).

(*a*) Aliens Order, 1920, Art. 1 (3): "Leave shall not be given to an alien to land in the United Kingdom unless he complies with the following conditions, that is to say . . . (g) he has not been prohibited from landing by the Secretary of State."

By Art. 1 (4), as amended by Orders of March 12, 1923, and August 11, 1931, "An immigration officer, in accordance with general or special directions of the Secretary of State, may, by general order or notice or otherwise, attach such conditions as he may think fit to the grant of leave to land, and the Secretary of State may at any time vary such conditions in such manner as he thinks fit, and the alien shall comply with the conditions so attached or varied. An alien who fails to comply with any

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Held, under Art. 1 (4) of the Aliens Order, 1920, as amended, by being found in the United Kingdom on a day after the day limited by the condition of her passport, she was deemed to be an alien whose landing had been prohibited by the Secretary of State, and she had therefore committed the offence with which she was charged, the circumstances in which she returned to the United Kingdom being immaterial.

Appeal against conviction.

The appellant was charged on May 10, 1933, at London Sessions on an indictment in the following terms: "First Count. Statement of Offence. Contravening the provisions of Part I, Art. 1 (3) (g), and Part III, Art. 18 (1) (b), of the Aliens Order, 1920, made under the Aliens Restriction Acts, 1914 and 1919. Particulars of Offence. Germaine Larsonneur on the 22nd day of March, 1933, in the county of Surrey, being an alien failed to comply with a condition imposed by the Secretary of State, to wit to leave the United Kingdom. Second Count. Statement of Offence. Contravening the provisions of Part I, Art. 1 (3) (g), and Part III, Art. 18 (1) (b), of the Aliens Order, 1920, made under the Aliens Restriction Acts, 1914 and 1919. Particulars of Offence. Germaine Larsonneur on the 21st day

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conditions so attached or varied, and an alien who is found in the United Kingdom at any time after the expiration of the period limited by any such condition, shall for the purposes of this Order be deemed to be an alien to whom leave to land has been refused. Where a condition limiting the period during which an alien may remain in the United Kingdom has been attached to the grant of leave to the alien to land in the United Kingdom or has been imposed by way of variation of any condition so attached, the condition so attached or varied shall remain in force notwithstanding that within the period so limited the alien has entered the Irish Free State, the Isle of Man, or the Channel Islands."

By Art. 18 (1) (b), as amended by Order of March 12, 1923, "If any alien, having landed in the United Kingdom in contravention of Art. 1 of this Order, is at any time found within the United Kingdom he shall be guilty of an offence against this Order."

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of April, 1933, in the county of Anglesey, being an alien to whom leave to land in the United Kingdom has been refused was found in the United Kingdom."

On March 14, 1933, the appellant, who was a French citizen, landed at Folkestone with a French passport, which was endorsed "Leave to land granted at Folkestone this day on condition that the holder does not enter any employment, paid or unpaid, while in the United Kingdom." On March 22, 1933, the condition was varied by the following endorsement signed by an Under-Secretary of State: "The condition attached to the grant of leave to land is hereby varied so as to require departure from the United Kingdom not later than the 22nd March, 1933." On that day the appellant went to the Irish Free State. An order for her deportation from the Irish Free State was made by the executive of that country, and on April 20, 1933, she was brought back in the custody of the Irish Free State police to Holyhead and handed over to the police there, where she was detained until a police officer from London, Det.-Sgt. Minter, arrived. On the following day she was taken to London in custody, and on April 22 was charged before a police magistrate there.

The Chairman ruled that the Irish Free State was not part of the United Kingdom for the purposes of the first count of the indictment and that there was no case to go to the jury on that count. On the second count the jury returned a verdict of "Guilty through circumstances beyond her own control," and the Chairman passed a sentence of three days' imprisonment and made an order recommending the appellant for deportation.

Marston Garsia, for the appellant:

Under the Aliens Order, 1920, Art. 1 (3) (g), read in conjunction with Art. 1 (4), the mere fact of the appellant being found in the United Kingdom after the expiration of the time limited for her departure therefrom auto-

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matically made her an alien to whom leave to land had been refused. This in itself, however, is not an offence under the Aliens Order, 1920. For an alien to whom leave to land has been refused to commit an offence under Art. 18 (1) (b) of the Order three elements are necessary: (i) the alien must land in the United Kingdom; (ii) such landing must be contrary to Art. 1 of the Order; (iii) the alien, having so landed in the United Kingdom, must be found therein. Therefore the mere fact of being found in the United Kingdom after the time limited for her departure therefrom had expired was not in itself an offence, unless it could be proved in addition that she landed in the United Kingdom in contravention of Art. 1. Here the evidence showed that she had not landed at all, but that she had been landed by a superior force over which she had no control. Having thus come to be found in the United Kingdom, she was not guilty of any offence under Art. 18 (1) (b).

J. F. Eastwood, for the Crown:

The whole point is whether the appellant was found within the United Kingdom; how she got here makes no difference at all. The word "found" was used deliberately in the section so that if any alien who has no right to be here is here an offence is committed. By reason of Art. 1 (4) of the Order she falls within the same category as one who had originally been prohibited from landing.

Marston Garsia replied.

THE LORD CHIEF JUSTICE: This appellant was indicted at the County of London Sessions upon an indictment containing two counts. On the first count she was acquitted by the direction of the Chairman. [After reading the second count as set out above his Lordship continued:] The fact is, as the evidence shows, that the appellant is an alien. She has a French passport, which bears this statement under the date March 14, 1933, "Leave to land

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granted at Folkestone this day on condition that the holder does not enter any employment, paid or unpaid, while in the United Kingdom," but on March 22 that condition was varied and one finds these words: "The condition attached to the grant of leave to land is hereby varied so as to require departure from the United Kingdom not later than March 22, 1933." Then follows the signature of an Under-Secretary of State. In fact, the appellant went to the Irish Free State and afterwards, in circumstances which are perfectly immaterial, so far as this appeal is concerned, came back to Holyhead. She was at Holyhead on April 21, 1933, a date after the day limited by the condition on her passport.

In these circumstances, it seems to be quite clear that Art. 1 (4) of the Aliens Order, 1920 (as amended by the Orders of March 12, 1923, and August 11, 1931), applies. The Article is in the following terms: "An immigration officer, in accordance with general or special directions of the Secretary of State, may, by general order or notice or otherwise, attach such conditions as he may think fit to the grant of leave to land, and the Secretary of State may at any time vary such conditions in such manner as he thinks fit, and the alien shall comply with the conditions so attached or varied. An alien who fails to comply with any conditions so attached or varied, and an alien who is found in the United Kingdom at any time after the expiration of the period limited by any such condition, shall for the purposes of this Order be deemed to be an alien to whom leave to land has been refused."

The appellant was, therefore, on April 21, 1933, in the position in which she would have been if she had been prohibited from landing by the Secretary of State and, that being so, there is no reason to interfere with the finding of the jury. She was found here and was, therefore, deemed to be in the class of persons whose landing had been prohibited by the Secretary of State, by reason of the

fact that she had violated the condition on her passport. The appeal, therefore, is dismissed and the recommendation for deportation remains.

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Appeal dismissed.

Solicitors—Addis & Co., for appellant; Wontner & Sons, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE HUMPHREYS.

FREDERICK BRAMHILL.

1933.
19 & 26 *June.*

Summing-up—Sexual Offence—Evidence of Young Children—Long Indictment Alleging Series of Offences against Several Children—No Distinction between Different Counts—No Warning as to Care in Accepting Evidence of Young Children — No Direction whether each Child was to be Regarded as Victim or Participant—Conviction Quashed.

The appellant was charged on an indictment containing ten counts alleging carnal knowledge of three girls aged ten, eleven and twelve respectively during a period extending over a year. It was alleged that the appellant committed the offences upon each of the girls in turn, while the other two kept watch. On four of the counts in the indictment there was no evidence against the appellant beyond that of the particular girl on whom it was alleged that the offence had been committed. The Judge, in his summing-up, drew no distinction between the different counts, omitted to warn the jury as to the care they should exercise in accepting the evidence of young children, and failed to direct the jury that they ought to consider in the case of each girl whether she was to be regarded as a victim or as a participant in the offence.

Held, the summing-up was so inadequate as to necessitate the quashing of the conviction.

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Appeal against conviction and sentence.

The appellant was convicted at Leeds Assizes, before Macnaghten, J., on May 5, 1933, on charges of carnal knowledge of three girls under thirteen years of age and sentenced to seven years' penal servitude. The indictment, which contained ten counts, charged the appellant with having carnal knowledge of three girls aged ten, eleven and twelve years of age respectively during a period extending over a year and ending in March, 1933. The appellant was employed as a furnaceman and it was part of his duty to keep the furnaces going over the week-ends, at which time he was often alone in the works. The three girls went to the works on Saturday afternoons and evenings to deliver to the appellant newspapers, and he gave them on occasions pennies. On these occasions, it was alleged, the appellant committed the offences upon each of the girls in turn while the other two kept watch.

H. B. H. Hylton-Foster, for the appellant:

The learned Judge in summing up at the trial failed to point out that the sole evidence on counts 3, 4, 9 and 10 of the indictment was that of the girl alleged to have been assaulted and drew no distinction between these counts and the other six counts. Some words of warning were uttered, it is true, but the jury were never told that the other girls might be regarded as accomplices inasmuch as two of them kept watch while an assault was being committed on the third girl. They were, therefore, accomplices in so far as they had guilty knowledge that what was being done was wrong. If the children were accomplices it was clear that they could not give evidence corroborating the evidence of other children who were accomplices. In the case of CRATCHLEY (1913), 9 Cr. App. R. 232, the question was raised whether a boy under ten could be an accomplice, and it was laid down that if there was evidence of guilty knowledge on the part of the child

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it was for the jury to say whether he had such guilty knowledge, and in such cases there ought to be a warning by the Judge that the jury must act on evidence of this character with extreme care. Moreover, the jury were not told of the necessity for corroboration of the evidence of children of tender years. In the case of WARREN (1919), 14 Cr. App. R. 4, at p. 5, Darling, J., said: "The conviction is attacked on the ground that it depended upon the evidence of an accomplice which was uncorroborated. The accomplice was a boy of thirteen, and whether or not the boy was an accomplice in the sense that he could be charged with the offence, we think that the Judge ought to have warned the jury against acting on the evidence of an accomplice, and also a warning should have been given to them against acting on the evidence of a boy of that age." In the case of MARSHALL (1925), 18 Cr. App. R. 164, at p. 165, the Lord Chief Justice said: "Where the evidence of young children is under consideration a clear and full warning about the nature of the evidence should be given to the jury."

T. G. Talbot, for the Crown:

The fact that the offence was committed with each of the girls does not affect the question of corroboration. The amount of corroboration necessary in the case of victims as opposed to accomplices is different and the question is treated differently (see HEDGES (1909), 3 Cr. App. R. 262). In GRAHAM (1910), 4 Cr. App. R. 218, the judgment of Channell, J., indicates the nature of the warning which should be given in the case of the evidence of victims. [Counsel also referred to CROCKER (1923), 17 Cr. App. R. 46, and LOVELL (1923), 17 Cr. App. R. 163.] A victim can corroborate an accomplice, and *vice versa*. In the case of GREGG (1933), 24 Cr. App. R. 13, the Court rejected the argument that one child of tender years could not corroborate another child of tender years.

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[HUMPHREYS, J.: There is something ridiculous in the picture of a child with the word "accomplice" underneath.]

If these children were accomplices they were only accomplices by accident. They did not go to the works to help the appellant in the commission of a crime. In any event this is essentially a case where the Court should apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907.

Hylton-Foster replied.

THE LORD CHIEF JUSTICE: This appellant Frederick Bramhill was found guilty at Leeds Assizes upon an indictment which charged him in ten counts that on March 11, 1933, and on other dates he had carnal knowledge of three young girls under the age of thirteen. The jury convicted him upon all the counts of the indictment, and on May 5 the appellant was sentenced to seven years' penal servitude concurrently. He now, by leave, appeals against conviction and sentence. The appellant is a man of fifty-four years of age with a perfectly clean record and is a furnaceman. Evidence was given by the foreman of the firm as to the appellant's hours of duty and it appeared that he was often alone at his work on Saturday afternoons. The three young girls, aged twelve, ten and eleven years respectively, according to the evidence, went to the place where the appellant was employed to deliver to him newspapers and to receive a penny for so doing, and these little girls related that while they were at the works the appellant committed these offences upon them in turn, two of them keeping watch while the offence was being committed upon the third. There was medical evidence to show that the condition of these three girls was consistent with the commission of the offences by somebody. The appellant himself gave evidence. His defence was a denial. He offered no explanation why these three children should tell a story against him.

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Now the question which we have to consider is a question based upon the summing up by the Judge. In the first place it is pointed out that although there were no fewer than ten counts in the indictment no distinction at all was suggested between them. This failure to draw a distinction between different counts of a long indictment is directly contrary to what has been laid down by this Court. In the present case the result is perhaps not obscure, because the jury, in convicting upon all the counts, convicted on counts 3, 4, 9, and 10, and with regard to every one of these four counts it is manifest that there was no evidence against the appellant except the evidence of the particular child upon whom the offence was said to have been committed. In our view, that omission to distinguish between the various counts of an indictment containing ten counts is in itself sufficient to render this trial unsatisfactory.

But there is more than that. It is further pointed out that the girls giving evidence here were all participants in the alleged acts or all watchers keeping a look-out. Although this evidence came solely from these young children under thirteen years of age, there is in the summing-up no warning at all as to the evidence of children of tender years. It is quite true that in one part of the summing-up there is in general terms a warning, but there is no warning of the kind which I have mentioned.

Thirdly, and finally, it was never pointed out to the jury that they ought to consider in the case of each of these children whether she was to be regarded as a victim or as a participant, and it may well be, as counsel for the appellant has observed, that in the way in which the case was left to the jury, although the word accomplice was not used, the jury may have regarded the evidence of one accomplice as corroborating the evidence of another accomplice. It is quite evident when one looks at a

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particular passage in the summing-up by the Judge that he intended to return at a later stage to the topic of the warnings or cautions which the jury ought to have in mind, but somehow, for some reason which does not appear and which it is dangerous to conjecture, he never did so return and we have merely the statement that he was dealing with the matter more fully later. In fact he never did return to that matter later.

In these circumstances, after a long and careful consideration, we have come to the conclusion that this summing-up was inadequate and that we cannot apply the proviso to section 4, sub-section 1 of the statute. In other words, it is not possible upon the evidence in this case to say that, given a satisfactory summing-up, the jury would certainly or must inevitably have arrived at the same conclusion. It is a troublesome case, but in view of the clear principles of law which have been laid down by this Court again and again we are all of the opinion that we have no alternative but to allow this appeal and quash this conviction.

Conviction quashed.

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Indictment—Simple Larceny—Conviction of Fraudulent Conversion—Larceny Act, 1916 (*6 & 7 Geo. 5, c. 50*), *ss.* 2, 20, 44.

On an indictment for simple larceny there cannot be a conviction of fraudulent conversion, contrary to section 20 of the Larceny Act, 1916.

Appeal against conviction.

The appellant was charged at Middlesex Sessions on May 11, 1933, on an indictment containing four counts. The first and second counts charged him respectively with stealing and receiving a ring, and the third and fourth counts respectively with stealing and receiving the sum of 15s. The appellant was acquitted on counts 1, 2 and 4 and was found guilty of fraudulent conversion on the third count and sentenced by the Chairman to two years' imprisonment with hard labour.

The sum of 15s. was handed to the appellant by one Maud Cantle in order that he might buy her a ticket for a coach ride to Bournemouth. There was evidence which satisfied the jury that he did not buy a ticket or that, if he did, he used it for himself, because what Miss Cantle received was a registered letter containing worthless papers, but no ticket.

Grace Prescott, for the appellant:

This conviction is bad because the appellant was charged with larceny and he has been found guilty of fraudulent conversion. If he were really in the position of a bailee he could not be convicted unless the circumstances were that he had to re-deliver the very same 15s. which he had obtained (HASSELL (1861), L. & C. 58). The appellant was not in the position of a bailee.

[HUMPHREYS, J.: There was no charge of larceny as a bailee. The charge was larceny.]

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The Chairman referred to fraudulent conversion or fraudulent disposition, and consulted the Larceny Act, 1916, s. 44 (*a*), but that section is concerned with section 17 of the Act which deals with embezzlement.

[THE LORD CHIEF JUSTICE: On the record it is stated that the accused was convicted of fraudulent conversion.]

Christmas Humphreys, for the Crown:

In this case the proviso contained in the Criminal Appeal Act, 1907, s. 5, sub-s. 2, should be applied, because on the evidence given and if the jury had been properly directed they could have found a verdict of guilty of larceny.

HUMPHREYS, J.: This appellant, Francis Joseph Stevens, was convicted at Middlesex Sessions on the third count of an indictment containing four counts and now appeals against his conviction. [His Lordship stated the facts as set out above and continued:] In these circumstances he was tried and after the evidence for the prosecution had been closed Miss Prescott, who appeared for the defence, made a submission to the Chairman. Her submission started with the statement that her client was charged with larceny as a bailee. The charge was larceny or what used to be called simple larceny. Miss Prescott submitted that a charge of larceny as a bailee meant that the accused had failed to return the same article which

(*a*) Larceny Act, 1916, s. 44, sub-s. 2: "If on the trial of any indictment for any offence against section seventeen of this Act (relating to embezzlement) it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly; and on the trial of any indictment for stealing the jury may in like manner find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be, and thereupon he shall be liable to be punished accordingly."

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had been entrusted to him. The Chairman was then handed a book and his attention was drawn to section 44 of the Larceny Act, 1916. This section was quite irrelevant to the matter under discussion, but the Chairman ruled against the submission. The trial was proceeded with, and after the evidence for the defence had concluded the Chairman summed up to the jury by telling them that in this case the prisoner was charged with larceny as a bailee and that in the case of a charge of larceny as a bailee a person may by statute be found guilty of fraudulent conversion or fraudulent disposition as the case may be and therefore the jury had to consider whether there was in the man's mind any intention to keep the money.

That direction was one likely to confuse a jury and is wrong in law. Upon the facts the accused might have been convicted of larceny by a trick, but before they so convicted the jury would have to be satisfied that when he obtained the money he intended to steal it, and if he had that intention it was immaterial what he did with the money. That direction was never given to the jury. The direction given may have left the jury under the impression that if the prisoner obtained the money without felonious intention and later on changed his mind and converted the money to his own use that might amount to the offence of fraudulent conversion under section 20. This is the view the jury appear to have taken, because when asked if they found the appellant guilty of the fraudulent conversion of 15s. their answer was "Guilty," and the result was that the record now before the Court is bad on the face of it, because the charge was larceny and there was a conviction of fraudulent conversion, and it is clear that there is no power to convict of fraudulent conversion a person charged with larceny.

It is true that this Court can in proper cases, if it finds that the appellant has been convicted of an offence and the jury could on the indictment have found him

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guilty of some other offence, substitute for the verdict found by the jury a verdict of guilty of such other offence. In this case it is by no means certain that the jury understood with what the appellant was really charged. The observations made by the Chairman during the case and later on in the summing-up show this and under the circumstances this appeal must be allowed and this conviction quashed.

Conviction quashed.

Solicitors for the Crown : Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HORRIDGE AND MR. JUSTICE HUMPHREYS.

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WALTER ROBERT POWELL.

Sentence—Remanet—Preventive Detention—No Power to Order Remanet to be Served Concurrently with Fresh Sentence.

Neither the Prison Commissioners nor the Secretary of State has power to order the remanet of a sentence, either of imprisonment or penal servitude or preventive detention, to be served concurrently with a fresh sentence.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Surrey Sessions on May 16, 1933, to four charges of housebreaking, and was sentenced by the Chairman to seven years' penal servitude, twelve outstanding charges being taken into consideration. On a charge of being a habitual criminal he was found not guilty.

The applicant had in October, 1928, been convicted at

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Edinburgh of forgery and larceny and was also then found to be a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention. He served the sentence of penal servitude and was released on licence by order of the Secretary of State after serving a short portion of the term of preventive detention.

The Chairman of Surrey Sessions, before passing sentence, had asked a police sergeant, who gave evidence of the prisoner's character, "What is the position in regard to this prisoner's licence?" and had received the answer: "It is entirely a matter for the Prison Commissioners." The Chairman then asked: "It lies with the Prison Commissioners to say whether it [the remanet] runs consecutively or concurrently?" and the police sergeant answered, "That is so."

No counsel appeared either for the applicant or the Crown.

HUMPHREYS, J.: It appears that at the trial it was mentioned to the Court by a police sergeant that the applicant, who has a very bad criminal record, had at that time a remanet of a sentence of preventive detention to serve. He had been sentenced on October 12, 1928, to three years' penal servitude and five years' preventive detention, and the police officer mentioned to the Court that, having served the sentence of three years' penal servitude, he had served only a portion of the sentence of preventive detention and had then been let out on licence. In those circumstances the police officer was asked what was the position with regard to that licence, and his answer was: "It is entirely a matter for the Prison Commissioners." He was further asked: "It lies with the Prison Commissioners to say whether it [the remanet of the sentence of preventive detention] runs consecutively or concurrently?" and the police officer replied, "That is so."

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This Court thought it right to communicate with the Prison Commissioners and we have now received an intimation from the Secretary of State to the effect that that was quite a misapprehension on the part of the police officer. The position is that neither the Prison Commissioners nor the Secretary of State has any power to direct that a remanet of a sentence either of imprisonment or penal servitude or preventive detention should be served concurrently with a fresh sentence. As possibly the police sergeant meant and as the fact is, in the case of every person sentenced to a term of preventive detention, the Secretary of State may by the terms of the Prevention of Crime Act, 1908, at any time in his discretion release the convict on licence. It is quite true that in this case it will be open to the Secretary of State to grant this applicant a licence or not as he pleases; but the position with regard to the sentence as it stands is that the applicant will have to serve the sentence of seven years' penal servitude and at the end of that sentence he will be sent back to Scotland to serve the remanet of his sentence of preventive detention.

In these circumstances, this Court has to consider whether, having regard to the persistent nature of the crimes committed by the applicant and the fact that twelve other cases were taken into consideration, this sentence was too severe. The Court is of opinion that the sentence was not an improper one, and the application must be dismissed.

Application dismissed.

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Affidavits by Jurors—Trial in Wales—Allegation that Two Jurors Understood English Imperfectly—Refusal of Court to Admit.

On an appeal against a conviction in Wales, leave was asked to submit to the Court affidavits by two jurors, alleging that they did not understand the English language sufficiently to enable them to follow the proceedings.

Held, the Court ought not to look at the affidavits.

RAPHAEL *v.* BANK OF ENGLAND (1855), 4 W. R. 10, and ELLIS *v.* DEHEER, [1922] 2 K. B. 113, applied.

Appeal against conviction and sentence.

The appellant was convicted at Merionethshire Sessions on April 4, 1933, of sheepstealing and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The evidence at the trial was given partly in English, and partly in Welsh, an interpreter being present in Court throughout. Counsel for the Crown, who was present at the trial, stated that the oath was administered in English, but that he could not recollect whether each individual juror repeated the words of the oath. He also stated that, in his opening speech, he had referred to an alleged statement by the prisoner in Welsh, and that one of the jurors had intervened and said that she did not understand Welsh.

George Bankes, for the appellant:

Leave is sought to refer to affidavits by two of the jurors, alleging that their knowledge of the English language was insufficient to enable them to follow the proceedings. If leave is granted, it will then be submitted that the matters therein referred to are sufficient to render the conviction bad. It is conceded that anything that takes place in the jury room cannot be given in evidence before any Court. That is established by ELLIS *v.* DEHEER, [1922] 2 K. B. 113 and ROBERTS *v.* HUGHES (1841), 7

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M. & W. 399. RAPHAEL *v.* BANK OF ENGLAND (1855), 4 W. R. 10, is also in point, but that case merely shows that what the jury thought about the effect of their answers is inadmissible. Other cases in point are HANCOX (1913), 8 Cr. App. R. 176, 193, SYME (1914), 10 Cr. App. R. 284, WILLMONT (1914), 10 Cr. App. R. 173, and MELIK (1915), 11 Cr. App. R. 100. The result of all these decisions is that it is open to the Court to consider these affidavits, if it desires to do so; and it is submitted that they should be looked at, inasmuch as they relate to matters that took place in open Court and matters concerning the capacity of jurors to sit as jurors.

J. Jones Roberts, for the Crown:

The practice is well established that affidavits by jurors should not be received. Where jurors have taken the oath, sat through the trial and listened to the verdict, they cannot afterwards be heard to say anything which might nullify the verdict. The intervention by the juror who did not understand Welsh during the opening speech afforded ample opportunity for any jurors who did not understand English to protest.

[HUMPHREYS, J.: The point taken here is that two of the jurors were not qualified to be jurors. Suppose one of the persons had been disqualified by law, could this Court entertain that objection after verdict?]

No, it would then be too late.

[HORRIDGE, J.: Could a juror afterwards say that he was so ill in Court that he could not understand what was being said?]

George Bankes, in reply.

In *Ex p.* MORRIS (1907), 72 J. P. 5, the question whether an affidavit could be received as to the alleged insobriety of a juror during the trial was considered. In WAKEFIELD, 13 Cr. App. R. 56; [1918] 1 K. B. 216, a person sat on a jury who was not entitled to do so, and a *venire de novo* was granted.

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[HUMPHREYS, J.: In SHEPPARD (1773), 1 Leach 101, it was decided that if the whole jury had been wrongly summoned by an interested person it was too late to take the objection after verdict.]

THE LORD CHIEF JUSTICE: This appellant Robert Llewelyn Thomas was convicted at the Merionethshire Sessions upon an indictment containing two counts. The first count charged that on January 26, 1933, he stole a sheep and the second charged that on the same day he stole another sheep. He was sentenced to twelve months' imprisonment with hard labour. He applied some three weeks out of time for an extension of time in which to apply for leave to appeal against conviction and sentence. The only ground of appeal then or now suggested is that two members of the jury did not understand English sufficiently well to follow the evidence or the speeches or the summing-up. The appellant, it is to be observed, was defended by counsel and no question of that sort was raised at the trial nor was any protest made at the trial nor for some weeks afterwards. The case for the prosecution was that the appellant stole these two sheep and took them to be slaughtered, and the defence was that he sent them to be slaughtered by mistake and did not himself take them.

Mr. Bankes, in his very able argument, has endeavoured to persuade the Court that it ought to look at affidavits from two members of the jury showing that they did not sufficiently well understand the English language. In our opinion, we ought not to look at these affidavits. I am not going to review the mass of authority on this point and will refer to three matters only. In the first place, this was a case of felony and in cases of felony every juror as he or she comes to the Book to be sworn, unless challenged, takes the oath or makes an affirmation in a prescribed form. That form, which is familiar, is in the

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English language, and it is clear that that oath was taken in the present case.

With regard to this class of affidavits the matter seems to the Court to come within the mischief referred to by Willes, J., in RAPHAEL *v.* BANK OF ENGLAND (4 W. R. 10, at p. 11): "If either the affidavit is as to what was passing in the mind of the particular juryman or as to what took place in the jury room, in the latter case it is not admissible and in the former it does not lie in the mouth of a person who hears and makes no objection to come afterwards to alter the verdict by the explanation that he dissented in a voice which the counsel, with all his vigilance, and the Judge did not hear."

Finally, in the case of ELLIS *v.* DEHEER, [1922] 2 K. B. 113, at p. 118, Bankes, L.J., said: "When a verdict is delivered in the sight and hearing of all the jury without protest their assent to it is conclusively inferred." It needs little reflection to see how wide a door would be opened if the contrary doctrine were to prevail. We think, therefore, that this conviction must stand.

With regard to the sentence, it is apparent that the appellant was a man of good character, and we have come to the conclusion that, in all the circumstances, the sentence may properly be reduced to one of six months' imprisonment. The time during which the appellant has been treated as an appellant will count towards that sentence.

Conviction affirmed.
Sentence reduced.

NOTE.—In *Ras Behari Lal and Others* v. *The King-Emperor* (50 T. L. R. 1) a similar point arose on an appeal from India to the Judicial Committee of the Privy Council. The judgment in *Thomas* was cited to the Board, but they declined to follow the principle there laid down. On being satisfied, as the result of an inquiry, that one

of the jury at the trial did not understand English, the language in which some of the evidence, counsel's addresses, and the Judge's charge were given, they quashed the convictions. Lord Atkin, in giving the judgment of the Board, said: "Owing to the remarkable fact that there is no official shorthand note of judgments delivered by the Court of Criminal Appeal, their Lordships might have been in a difficulty if they had not had the advantage of seeing an advance copy of the report [of *Thomas*] to be published in the Criminal Appeal Reports."

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Defamatory Libel—No Plea of Justification—Close of Case for Defence—Witnesses Called by Judge—Questions Suggesting that issue was whether Words Complained of were True—Conviction Quashed.

On the trial of a prisoner for publishing defamatory libels there was no plea of justification, but after the close of the case for the defence the Judge called a number of witnesses, including the two persons alleged to have been libelled, and put to them a number of questions which, as the Court held, might have suggested to the jury that the issue was whether the words complained of were true.

Held, the calling of these witnesses was irregular, and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on May 12, 1933, of publishing defamatory libels and was sentenced by the Recorder to twelve months' imprisonment.

The indictment contained four counts, and the charges related to the publishing of alleged libels concerning Sergeant Tracey and Sergeant Dennis, two officers of the Metropolitan Police Force, in anonymous letters addressed

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to the Chief Constable of New Scotland Yard and the Chief Superintendent of the Criminal Investigation Department respectively. At the trial the plea was one of "Not Guilty" and there was no plea of justification. It was not disputed that the letters had been written by the prisoner. Counsel for the prisoner submitted that all the publications were made on privileged occasions, and the Recorder ruled that this was so, but that there was evidence of malice. After the close of the case for the defence the Recorder called as his own witnesses six persons, including the two sergeants alleged to have been libelled, and put to them a number of questions.

D. M. Rosenberg, for the appellant:

It is submitted that the witnesses should not have been called by the Judge, in the absence of any sudden emergency which could not have been foreseen. Moreover, many of the questions put by the Judge to the witnesses were relevant only to justification, and there was no plea of justification in this case.

Eustace Fulton, for the Crown:

The circumstances in which a Judge is entitled to call witnesses are set out in *Archbold's Criminal Pleading* (28th ed.), p. 506. Here the jury had to ask themselves the question whether the prisoner, before writing the letters on which the charges were founded, made such reasonable inquiries as a man with a non-malicious mind might be expected to make. The question of the truth of the statements, therefore, though somewhat remote from the issue, was not wholly irrelevant. It is submitted that, if the calling of these witnesses by the Judge is held to be irregular, this is a case where the Court might apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE [after referring to the charges contained in the indictment]: It is not necessary to read

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out the letters in which the appellant made various charges against two police sergeants. It is enough to say that at the trial there was no question raised as to the truth of the libels. There was no plea of justification and it was never suggested on the part of the appellant that what he had written was true. The trial took a peculiar course. After the evidence proper had been given, the learned Recorder, conducting, as it would seem, an inquiry of his own, proceeded to call half a dozen witnesses, in spite of the protest of counsel for the prisoner and in face of the manifest unwillingness of the counsel for the prosecution. Those witnesses included Sergeant Tracey and Sergeant Dennis.

As was said by this Court in LIDDLE (21 Cr. App. R. 3, at p. 11): "A Judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice, but in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case for the defence is closed, except 'in a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue.'" Now in our opinion those conditions were not fulfilled with regard to these witnesses and it follows that the evidence of these six witnesses was, in our view, wrongly admitted.

It is suggested faintly that nevertheless no injustice was done. There are various answers or possible answers to that contention. I will mention one not as being exhaustive but as being sufficient. When one looks at the evidence which was admitted, it is apparent that many questions were asked which may well have created the impression that the real issue was whether the words complained of in those letters were true or not. That, of course, was not

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the issue, and indeed the learned Recorder said so. Still that evidence was given and those questions were asked and it is not possible for us to say that if this evidence had not been admitted the result must necessarily or would inevitably have been the same. In these circumstances we have come to the conclusion, after careful consideration, that this conviction cannot stand. The appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE GODDARD.

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24 *July*.

ROBERT WILDE.

Trial—Two Indictments Tried Together—Trial a Nullity—Venire de Novo not Ordered in Circumstances of Case.

The appellant was charged on two indictments, which were tried together, and he was convicted on both.

Held, the trial was a nullity and, in the circumstances of the case, the Court would not exercise its power of ordering a *venire de novo*, but would merely quash the conviction.

McCONNELL (1928), 20 Cr. App. R. 163, followed.

Appeal against conviction.

The appellant was charged at the Quarter Sessions for the Holland Division of Lincolnshire on June 26, 1933, on two indictments. The first charged him with breaking and entering a shop at Pinchbeck, Lincolnshire, and stealing certain articles, and the second with entering the parish church at the same place with intent to commit a felony. The two indictments were tried together, and the appellant

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was convicted on both and sentenced by the Chairman to twelve months' imprisonment.

T. R. Fitzwalter Butler, for the appellant:

The two indictments having been tried together, the trial was clearly a nullity: McCONNELL (1928), 20 Cr. App. R. 163). It is conceded that in a proper case the Court has power to order a *venire de novo*: CRANE, 15 Cr. App. R. 183; [1921] 2 A. C. 299. In this case, however, it is submitted that the Court should follow the course taken in McCONNELL (*supra*) and simply quash the conviction. The appellant has been in custody for four weeks prior to trial and for another four weeks pending this appeal. It is admitted that there was some evidence to go to the jury, but neither case was by any means a clear one, and there were merits with regard to the defence. [He was stopped.]

Christmas Humphreys, for the Crown:

It is agreed that the trial was a nullity. Counsel for the appellant has conceded that in a proper case the Crown would be entitled to ask for a *venire de novo*, but in this case I am instructed not to take this course, in view of the insufficiency of the summing-up and the fact that there were merits with regard to the defence.

THE LORD CHIEF JUSTICE: This appellant was tried on two indictments at the same time and appeals against conviction. The summing-up, which consisted of eleven lines, was a model of brevity, but not of adequacy. It is quite obvious that this appeal must be allowed and this conviction quashed, and in view of what has been said by counsel for the Crown we do not order a *venire de novo*.

Conviction quashed.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE CHARLES AND MR. JUSTICE LAWRENCE.

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13 *November.*

WILLIAM ROBERT HATCH.

Evidence—Possessing Housebreaking Implements by Night—Marks Corresponding with Implement Found on Doors of Houses—Admissibility.

At the trial of the appellant, who was charged with being found by night in possession of an implement of housebreaking, evidence was given that marks corresponding with the particular implement had been found on the doors of two houses. The appellant had been informed by the police that they did not intend to charge him with attempting to break into either of those houses, but in the summing-up the jury were, in substance, invited to come to the conclusion that the appellant had attempted, by means of the particular implement, to break into those two houses.

Held, in view of the admission of the evidence, in the circumstances of this particular case, and of the direction in the summing-up the conviction must be quashed.

Semble, apart from the circumstances of this particular case, if the evidence had been confined to the fact that marks had been found on doors which might have been made by a similar implement, it would have been admissible.

OLDHAM (1852) (2 Den. C. C. 472; 21 L. J. M. C. 184) considered.

Appeal against conviction (on certificate).

The appellant was convicted at Gloucestershire Sessions, on October 19, 1933, of being found by night in possession of an implement of housebreaking, and was sentenced by the Deputy-Chairman to fifteen months' imprisonment with hard labour.

The appellant was stopped by a police officer at

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Wootton, Gloucestershire, at 2.50 a.m. on August 19, 1933, and, after being asked some questions, turned and ran away, but was captured after a short chase. He was arrested and taken to the police station, and it was found that he had in his left trouser pocket and tucked under his waistcoat an iron instrument known as a "timber dog," which is an instrument in common use in the timber trade. At the trial evidence was given of marks found on two houses some little distance off which, it was said, corresponded with this instrument. The appellant stated in his evidence that he had picked up the instrument in the road about sixteen miles away from the place where he was arrested.

Prior to the trial the appellant had at first been told by the police that he would be charged with attempting to break into the two houses, but was subsequently informed that the police did not intend to proceed with any such charge against him.

The material passages in the summing-up appear in the judgment.

H. H. Maddocks, for the appellant:

The evidence with regard to the marks on the houses should not have been admitted, as no connection was shown between the appellant and those houses. If there had been any evidence to connect the marks with the appellant, the evidence might have been admissible on the authority of OLDHAM (2 Den. C. C. 472; 21 L. J. M. C. 134). In the present case, particularly if one refers to the summing-up, in order to prove intent, the prosecution have gone to the length of suggesting that the appellant committed two other offences—namely, attempting to break into those two houses.

R. C. Hutton, for the Crown:

The evidence was introduced in order to prove that the implement in question was a housebreaking implement.

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The police were entitled to show that it was something more than a matter of opinion that the implement was a housebreaking implement. They were entitled to show that an attempt had been made by means of a timber dog to break into a house. The Court is respectfully requested to lay down a rule for the guidance of the police as to how far evidence of marks found on doors is admissible on a charge of this nature.

AVORY, J.: This appellant was convicted at Gloucestershire Sessions of the offence of being found by night in possession of an implement of housebreaking without lawful excuse, contrary to section 28, sub-section 2 of the Larceny Act, 1916. The statute provides that the proof of lawful excuse shall lie upon the accused. The implement in question was a timber dog, an implement which may be, and ordinarily is, used for a lawful purpose. There is no question that the appellant was found in the early hours of the morning in possession of a timber dog. There is also no doubt that this fact, coupled with the conduct of the appellant when he was challenged by a police officer and with the opinion expressed by the police officer in the witness-box that this was an instrument capable of being used for housebreaking purposes, afforded ample evidence on which the accused might be lawfully convicted of the offence charged.

The appellant comes before this Court on a certificate from the Deputy-Chairman on the issue whether he properly admitted evidence not merely that marks had been found upon doors which corresponded with or might have been caused by an implement exactly like this one, but also the evidence of a police officer, who was asked by the accused whereabouts one of those houses was and replied: "On the north side of the city, where you were stopped by the policeman—it is just about there." That answer could only suggest to the jury that the accused was the

person who had caused the marks on the door of that particular house.

When the Deputy-Chairman came to sum up, notwithstanding that the accused, who defended himself with considerable ability, had pointed out that these marks need not necessarily have been caused by the particular implement in question and that the officer had been bound to reply that he could not say that they had been caused by the particular implement, but only by one exactly like it, he said: "Probably you will come to the conclusion that it is an instrument of housebreaking, and that he has not satisfied you he was in lawful possession of it." It would have been better if the Deputy-Chairman had said: "You will probably come to the conclusion that it is an instrument of housebreaking and it is for you to say whether he has satisfied you that he had a lawful excuse." Unfortunately the matter does not rest there. He proceeded to call the attention of the jury to the fact that the last three or four witnesses stated where, with such an instrument, attempts had been made to break into a house. He proceeded: "If you come to the conclusion after hearing that evidence that that weapon was used for trying to break into a house, it becomes a housebreaking implement." It is clear to this Court that in this particular case the jury were being invited to come to the conclusion that the appellant had attempted with this particular implement to break into the two houses.

We are not prepared to lay down any general principle that evidence of marks found on doors which correspond with an instrument found in the possession of an accused person may not be admissible in evidence, but the circumstances of this case were peculiar. Before the accused came to trial, he had at one time been warned by the police that he would be charged with attempting to break into these two houses, but later, upon his inquiring whether he was to be charged with those offences, he was

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told by the police that they did not propose to proceed with any such charge against him. He came, therefore, to trial with the assurance that he was not going to be charged with either of those offences. Notwithstanding that, this evidence was given and the summing-up was directed to showing that he was the person who had committed those other offences. Grievous injustice may, therefore, have been done to the accused. If he had been actually charged with those offences or told that a further indictment would be preferred against him, it is possible that he might have had a complete answer, or at all events he would have had the opportunity of showing that he could not have been the person who had actually committed those offences. Therefore, in the circumstances of the admission of this evidence suggesting that he was the person who attempted to break into those houses and of the direction to the jury that they might come to that conclusion, he was deprived of any possible opportunity of answering this charge by persuading the jury that he had a lawful excuse.

It is necessary to add one word upon a question raised by the judgment of Baron Alderson in OLDHAM (2 Den. C. C. 472, at p. 474; 21 L. J. M. C. 134, at p. 135). It was upon the basis of that judgment that this evidence was admitted. We do not decide that there is any fault to be found with that judgment, in which it is said: "Suppose that all the keys of a long street were found in the possession of a person without lawful excuse, there could be very little doubt that he meant to use them as implements of housebreaking; or suppose a chisel, which fitted a mark in a particular door, which someone had evidently been endeavouring to force open, was found upon a man, there could not be much doubt that it was an implement of housebreaking, although capable of being used for lawful purposes." That may be a perfectly correct direction on the circumstances of a

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particular case; on the other hand, it cannot be taken to apply to every case where a man is found in possession of a chisel, when there may be hundreds of the same kind which might produce the same marks. Although counsel for the Crown has told us that the police are anxious to have guidance in this matter for the future, we do not lay it down that evidence of this kind would not have been admissible, if it had been confined merely to the fact that the marks on the doors corresponded with the implement or might have been made by an implement like the one in question.

In the circumstances of this case we think that there was a misdirection to the jury and that there may have been a miscarriage of justice, and that this appeal, therefore, ought to be allowed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LAWRENCE.

EVAN MORRIS.

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Fraudulent Conversion—Count Charging Conversion of a General Balance.

A count in an indictment should not charge the fraudulent conversion of a general balance alleged to be due.

Appeal against conviction and sentence.

The appellant was convicted at Peterborough Sessions on October 5, 1933, on four counts of an indictment charging in the first three counts embezzlement and in the fourth count fraudulent conversion and was sentenced by the Acting Chairman to twelve months' imprisonment with hard labour.

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On May 23, 1927, the appellant was appointed area organiser for the Peterborough district for the Utilities Insurance Co., Ltd., being paid by salary and commission. Under his agreement he was forbidden to retain moneys collected and directed to account for them weekly to the company. In October, 1927, he persuaded a Mrs. Miller to sign a proposal form for a twenty-five year endowment policy of £500, at an annual premium of £15 15s. He collected from her 30s. on account of the first premium and three further sums of 30s., which he forwarded to his employers. Mrs. Miller went on paying regularly and in all paid the appellant £78 15s., but no further sums were forwarded by him to the company. On May 30, 1928, the company had cancelled the appellant's employment, but he was still at liberty to claim any commission he could earn by getting proposals.

The fourth count of the indictment charged the appellant with fraudulently converting to his own use and benefit £63 received by him for and on account of the Utility Insurance Co., Ltd.

R. P. Winfrey, for the appellant:

With regard to the first three counts, there was no evidence that the appellant was a clerk or servant. The question was not even left to the jury to find as a fact; for the Acting Chairman, in his summing-up, directed them that the appellant was so employed. With regard to the count for fraudulent conversion, that was framed as alleging the conversion of a general balance alleged to be due. This was wrong, and the charge should have been framed so as to show each item which the appellant was alleged to have converted.

S. L. Elborne, for the Crown:

The direction of the Acting Chairman that the appellant was a clerk or servant cannot be supported. The fourth count related to sums other than those which the appel-

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lant was alleged to have embezzled. Those sums were received by the appellant after May, 1928, and were received by him in a different capacity from that in which he was employed with regard to the sums alleged to have been embezzled. He had then ceased to be the whole-time employee of the company, and a totally different account between him and the company had been started.

THE LORD CHIEF JUSTICE: In our opinion, this appeal ought to succeed. The appellant was charged and convicted upon four counts of an indictment which charged him in the first three counts with embezzling moneys received by him for and on account of his employers and, finally, in the fourth count, with the fraudulent conversion of moneys received by him on account of a certain insurance company. It is not necessary to reiterate the facts which have been so fully laid before the Court. It appears to the Court that, although the appellant might properly have been convicted if he had been properly indicted, nevertheless upon this indictment he could not properly be convicted for two simple reasons.

With regard to the first three counts which related to embezzlement, there was nothing to show that the appellant was the clerk or servant of the insurance company. The case goes back to the well-known authority of NEGUS (1873), L. R. 2 C. C. R. 34, where, it is to be observed, the Court included Baron Bramwell and Blackburn, J., as he then was.

With regard to the fourth count, it is quite obvious that the appellant was charged with the fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken. In those circumstances, however lamentable the result may be, it appears to this Court that this appeal succeeds and that this conviction must be quashed.

Conviction quashed.

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MAGGIE HARE.

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MAGGIE HARE.

Sexual Offences—Indecent Assault on Male—Whether Offence can be Committed by a Woman — Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *ss.* 52, 61, 62.

A woman may be guilty of indecent assault upon a male person, contrary to section 62 of the Offences against the Person Act, 1861, or upon another female, contrary to section 52 of that Act.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 20, 1933, on three counts of an indictment charging her with indecent assault upon a boy of the age of twelve years and was sentenced by the Recorder to fourteen months' imprisonment in the second division. On certain other counts she was acquitted.

At the trial counsel for the defendant moved to quash the counts which charged indecent assault, on the ground that a woman could not in law be guilty of the offences charged. The Recorder ruled as follows: "This section says 'Whosoever shall be guilty of any indecent assault upon a male person,' and I am going to construe the word 'whosoever' as meaning what it obviously does mean, male or female, and therefore the motion to quash is overruled."

The trial then proceeded and evidence was given to the following effect: The appellant instigated and induced the boy to have connection with her on the three occasions alleged. Subsequently the boy was taken to hospital and it was found that he had been infected with a venereal disease. There was evidence that this disease had been communicated to him by the appellant. The boy's father, having ascertained these facts, indignantly accused the appellant, who at first maintained silence, but when the

accusation was repeated admitted that connection had taken place three times.

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Venetia Stephenson, for the appellant:

The offence of indecent assault upon a male person under section 62 of the Offences against the Person Act, 1861 (*a*), cannot be committed by a woman. "Any indecent assault" refers only to a sodomitical practice. This is apparent, not only if one has regard to the headnote to sections 61—63 of the Act, which is "unnatural offences," but also if one examines the history of section 62. The word "whosoever" is used at the beginning of section 62, because either man or woman can be guilty of bestiality. Sections 50, 51, 52 (*a*) and 54 of the Act all commence with the word "whosoever." The last of those sections makes it an offence to take away or detain against her will a woman with intent to marry or carnally know her, an offence which obviously could not be committed by a woman.

[AVORY, J.: A woman could be guilty of procuring or causing a woman to be married or carnally known by another person, which also is made an offence under the same section.]

(*a*) By the Offences against the Person Act, 1861, s. 52: "Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable . . . to be imprisoned for any term not exceeding two years, with or without hard labour."

Section 61: "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable . . . to be kept in penal servitude for life . . ."

Section 62: "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years . . ."

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It is significant also that an indecent assault on a male person under section 62 (*a*) is punishable by ten years' penal servitude irrespective of the age of the person assaulted, while indecent assault on a female under section 52 (*a*) is punishable only by two years' imprisonment. This, too, indicates that the assault referred to under section 62 is an act of sexual perversion. If a woman could be guilty of an offence under this section, one would expect to find some provision in the Punishment of Incest Act, 1908, to the effect that where a woman is charged with incest, but the offence is not proved, she may be convicted of an indecent assault on a male person if she has in fact had connection with a male under sixteen. [She referred also to *Craies' Statute Law* (3rd ed.), p. 186.]

Eustace Fulton, for the Crown, was not called on to argue.

AVORY, J.: The appellant in this case was convicted before the Recorder at the Central Criminal Court on three counts of an indictment which charged her with having committed an indecent assault on a boy under the age of sixteen, in fact of the age of twelve years. The alleged indecent assaults were laid upon August 9, 12 and 19, 1933, and it must be taken on the verdict of the jury that they accepted the evidence of the boy and his father. [His Lordship then briefly reviewed the evidence as set out above and continued:]

Upon that evidence and that verdict we are asked to hold that it was not competent for the Recorder to leave the case to the jury or for the jury to convict. The argument is that, the offence being laid under section 62 of the Offences against the Person Act, 1861, a woman cannot be convicted of an indecent assault upon a male person. The boy, being under the age of sixteen, was by law incompetent to consent to any such conduct as took place between him and the appellant and there can be no

question that the nature of the conduct was indecent. The whole question, as has been concisely put by counsel for the appellant, is whether the offence under section 62 is to be limited to an indecent assault of a sodomitical character.

For the appellant some reliance has been placed on the heading of this group of sections. The heading of sections 61—63 of the Act of 1861 is "Unnatural Offences." There is no question that section 61 and the first part of section 62 deals with what everyone would call unnatural offences, namely, bestiality or acts of a sodomitical character, but section 62 then refers to "any indecent assault upon any male person." The question is whether there is any ground for limiting the meaning of those words in the manner suggested.

The heading of a group of sections, as is well known, forms no part of the enactment; it is not voted on or passed in Parliament. Headings and marginal notes are inserted only after a bill has become law. A heading cannot control the plain meaning of the enacting part of the section. It may, in some instances, be looked at as a preamble, if there is some ambiguity in the meaning of the section on which it can throw light. In this case we can see no ground for saying that there is any ambiguity. Having regard to the fact that the word "whosoever" in section 61 admittedly includes a woman and that the first part of section 62 admittedly includes a woman, there can be no reason for saying that the phrase "whosoever . . . shall be guilty . . . of any indecent assault upon any male person" does not also include a woman.

There are many other sections in the statute to which reference has been made, such as section 52, where the word "whosoever" is used. There is no doubt, in our opinion, that in section 52 the word "whosoever" includes a woman; there can be no reason for saying that a woman cannot be guilty of indecent assault upon another female.

In the result, we think that the point urged on behalf

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of the appellant has no substance and that the appellant was properly convicted. The appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LAWRENCE.

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EDWIN BOOTHBY.

Evidence — False Pretences — Pretences Made Subsequently to those Charged—Admissibility.

The appellant was charged with obtaining food from one K. by false pretences, the false pretences alleged being that the appellant had certain money, was connected with a certain firm, and was then in a position to buy and pay for K.'s business. Evidence was admitted at the trial that, subsequently to the offence charged, the appellant had obtained food and lodging from one C. by falsely representing that he wished to buy C.'s farm and could find the money in a few days.

Held, in the circumstances of the particular case, without laying down any general principle, the evidence was inadmissible, and the conviction must be quashed.

RHODES ([1899] 1 Q. B. 77) explained and distinguished.

Appeal against conviction.

The appellant was convicted at Salford Hundred Quarter Sessions on October 24, 1933, of obtaining food by false pretences and was sentenced by the Chairman to nine months' imprisonment with hard labour.

The charge in the indictment related to the obtaining of food from one Ernest Kingston between September 20 and September 27 and the false pretences alleged were that the appellant's name was Ernest Beard; that he had £115 in the Isle of Man Bank and that this was about to be

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transferred to the Manchester and District Bank at Denton; that he was connected with a firm of packers in the Isle of Man; that he had a pension of £10 a month from the Prudential Insurance Co.; and that he then was in a position to buy and pay for the business of Ernest Kingston which was then for sale.

At the trial evidence was given by one Jonas Clarkson to the following effect: the appellant called on him on September 26, 1933, and said that he wanted to buy Clarkson's farm for £1,200 and would find the money in a few days and that he wanted it as a collecting place for food to send to the Isle of Man; Mr. Clarkson then gave the appellant food and lodging, but after a day or two the appellant left and did not return.

H. Emlyn-Jones, for the appellant:

Clarkson's evidence should not have been admitted. The case can be distinguished from RHODES ([1899] 1 Q. B. 77), where evidence of a subsequent false pretence was held to be admissible. There the evidence was directed to showing that the business carried on by the accused was not a *bona fide* one, but in the present case there was no evidence of any system and the incident as to which Clarkson spoke was an isolated act.

Christmas Humphreys, for the Crown:

The subsequent misrepresentation was admissible to prove *mens rea*. Evidence of a subsequent false pretence is admissible only when there is a very close *nexus* between that and the false pretence charged. The *nexus* here was that in both cases the appellant was saying that he wanted to buy a business and had the money available. [He referred to the judgment of Wills, J., in RHODES (*supra*) and to MASON ((1914), 10 Cr. App. R. 169).]

AVORY, J.—In this case the appellant was convicted at Salford Hundred Quarter Sessions of the offence of obtaining

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food by false pretences. The case against him was that he had called on a Mr. Kingston, who had a business for sale, and that he represented that he had certain money and was connected with a certain firm in the Isle of Man. The indictment also alleged that the appellant represented that he then was in a position to buy and pay for Mr. Kingston's business. It was not suggested that the appellant ever said so in so many words, but that by his various statements he represented that he was in such a position. He persuaded Mr. Kingston to allow him to stay for some days in his house, during which Mr. Kingston provided him with board and lodging. On September 26 the appellant left the house and was not seen again.

The only point on which leave to appeal was given and which has been argued by Mr. Emlyn-Jones is that the prosecution tendered the evidence of a Mr. Clarkson, to the effect that the appellant called on him on September 26 and stated that he wanted to buy Mr. Clarkson's farm; that he represented that he would find the money in a few days; that Mr. Clarkson allowed him to remain a few days, providing him with board and lodging, and that then the appellant left and did not return. The question whether the evidence of Mr. Clarkson was admissible was raised at the trial. Counsel for the prosecution said that he submitted that the evidence was admissible as indicating the appellant's course of conduct, and the Chairman said: "You really call this evidence to prove a system—systematic fraud going on." Counsel then said: "That is one ground. I also put it in this way—that Mr. Kingston was apparently told that the money would be coming through in three or four days, if his evidence be accepted." Then the Chairman admitted the evidence, saying: "You will have to take the risk of it." The Chairman, therefore, clearly doubted at that time whether the evidence was admissible.

Cases of this description are somewhat difficult to deal

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with. Undoubtedly there are authorities that in some circumstances evidence of a fraud alleged to have been committed subsequent to the one charged in the indictment may be relevant and properly admissible. There are, of course, cases which have never been doubted to the effect that evidence of similar frauds committed before the one in question may be admissible in order to show that the person charged knew he was making false representations. The case which is most relied upon in support of the admission of the evidence in the present case is RHODES ([1899] 1 Q. B. 77). It is to be observed that that case was decided upon its own facts alone. Each of the Judges who gave judgment held the evidence of subsequent conduct to be admissible solely because the alleged false pretence in that case was that the prisoner was carrying on a genuine business. No counsel appeared in that case to argue the case for the prisoner. It is significant that at p. 79 Wright, J., in the course of the argument, called attention to the passage in *Roscoe's Criminal Evidence* (11th ed.), p. 94, where it is said: "It is still doubtful whether pretences made subsequently to the one charged are admissible; but it seems, both on authority and on principle, that they are not, on the ground that it is possible that the guilty intention may not have arisen till after the acts upon which the charge is founded." In giving judgment, Wright, J., at p. 85, said that he was of opinion that the evidence in that case had been properly admitted, but solely on the ground "that it was an express part of the charge that the prisoner falsely pretended to be carrying on a genuine business, whereas in fact it was a bogus business." Bruce, J., who entertained considerable doubt as to the admissibility of the evidence, said at p. 85: "It is only relevant as tending to show that the business was a sham business, and it ought not to be used in any other way."

We are of opinion that the present case is not governed

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by RHODES (*supra*). There was no representation that the appellant was carrying on a genuine business or any particular kind of business. The case appears rather to come within the principle laid down in the passage in *Roscoe's Criminal Evidence* cited above. It is a case where it is possible that the guilty intention may not have arisen till after the acts upon which the charge was founded; in other words, the fact that the appellant may have intended to defraud Mr. Clarkson is not admissible to show that he intended to defraud Mr. Kingston, merely because he asked permission to remain in the house for a few days, during which he obtained a few shillings' worth of food. In all the circumstances, we have come to the conclusion that in this particular case, without laying down any general principle, the evidence of Mr. Clarkson ought not to have been admitted and that the jury were probably unduly influenced by it. The appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE CHARLES.

SARAH ANN WALKER.

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Indictment—Cruelty to Children—Neglect—Omission of Word "wilfully" in Particulars of Offence—Misdirection in Summing-up—Indictments Act, 1915 (5 & 6 *Geo.* 5. *c.* 90), *s.* 3, *Sched. I, rule* 4 (5), *Appendix to Rules, Form* 6.

The appellant was indicted for cruelty to a child, contrary to section 12 of the Children Act, 1908 [repealed by the Children and Young Persons Act, 1933, and substantially re-enacted by section 1 thereof], the Particulars of Offence alleged being that she "being a person over the age of sixteen years, having the custody, charge, or care of M. L. C. a child, neglected the said child in a manner likely to cause the said child unnecessary suffering or injury to its health." The word "wilfully," which occurs in the section, was omitted from the Particulars, the form employed being substantially Form 6 of the Forms of Indictment in the Appendix to the Rules made under the Indictments Act, 1915.

Held, as the indictment had followed the above form, it could not be regarded as bad in law, but it is better that in such a case the Particulars of Offence should include the word "wilfully."

Conviction quashed on the ground that the summing-up contained no proper direction on the meaning of "wilful neglect," the proper direction in such a case being in accordance with the direction in SENIOR [1899] 1 Q. B. 283, at p. 290.

Appeal against conviction.

The appellant was convicted at Lincoln Assizes on November 4, 1933, of cruelty to a child and was sentenced by the Commissioner of Assize (Sir Ellis Hume-Williams, K.C.) to six months' imprisonment.

The appellant was indicted together with a man named

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Twiggs, who was convicted of indecent assault on two young girls aged ten and eleven respectively and sentenced to two years' imprisonment with hard labour.

The count on which the appellant was convicted was in the following form: "Statement of Offence. Cruelty to a child, contrary to s. 12 of the Children Act, 1908. Particulars of Offence. Sarah Ann Walker, between the 1st day of June 1932 and the 11th day of September 1933, in the county of Lincoln, being a person over the age of 16 years, having the custody, charge, or care of Maureen Lillian Clark, a child, neglected the said child, in a manner likely to cause the said child unnecessary suffering or injury to its health."

The case for the prosecution was that Twiggs took Peggy Brooks, aged eleven, and Maureen Clark, aged ten, the daughter of the appellant, to various places where the girls used to sleep in his bed, and that he practised indecencies upon them; and that the appellant was aware that her daughter was going away on visits with Twiggs. The material portions of the summing-up appear in the judgment.

Nigel Robinson, for the appellant:

The count of the indictment on which the appellant was convicted was bad on the face of it, as it omitted the word "wilfully," which is included in the section on which the charge was founded. Secondly, there was no reference in the summing-up to the fact that the neglect must be "wilful" and "in a manner likely to cause the child unnecessary suffering or injury to its health." Further, the evidence was that the neglect was not wilful in the manner alleged, because, although the appellant admitted that she came to know that her child was sleeping in Twiggs' bed, it was conceded by the prosecution that she did not know of any indecency and therefore her mind cannot be said to have gone with it. [He referred to SENIOR [1899] 1 Q. B.

283; and HATTON (19 Cr. App. R. 29; (1925) 2 K. B. 322).]

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Walker Carter, for the Crown:

If one refers to section 3 of the Indictments Act, 1915, Rule 4 (5) of the Rules made under that Act, and Form 6 in the Appendix to the Rules, (*a*) it will be seen that the Legislature has specified a form in which an indictment for this offence should be drawn, and the prescribed form was here followed. "Wilful" neglect means intentional neglect. The prosecution have to prove two things: (i) that the accused did the act done knowing what she did; (ii) that the act done was a breach of her duty towards the child. A person accused cannot set up her own standard of conduct, and say that she is not guilty because she did not fall short of that standard. It is for the jury to set the standard. [He referred to SENIOR (*supra*).] It is true that the word "wilfully" was not used in the summing-up, but nothing would have been added by its use, as it was conceded that what the

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(*a*) By the Indictments Act, 1915, s. 3, sub-s. 1: "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

"(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

By rule 4 (5) of the Rules contained in the First Schedule to the Act: "The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case."

Form 6 of the forms set out in the Appendix to the rules is a precedent for an indictment for the offence of cruelty to a child.

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appellant had done was done intentionally. To support a conviction of aiding and abetting the acts of indecency, the prosecution would have had to show that the appellant actually knew what was going on; to support a conviction on the count on which the appellant was convicted, it was sufficient to show that the course of conduct was likely to cause the child unnecessary suffering.

AVORY, J.: The first point which has been taken is that in the count on which the appellant was convicted the Particulars of Offence omit the word "wilfully," which is in section 12, sub-section 1 of the Children Act, 1908. We have been referred, as a justification for this omission, to the Appendix to the rules made under the Indictments Act, 1915, and it undoubtedly appears that there is a form for this particular offence and that form omits the word "wilfully." We are not, therefore, prepared to say that this indictment is bad in view of the provisions of section 3 of the Indictments Act and of the fact that the offence is described in the Statement of Offence as being contrary to section 12 of the Children Act, 1908; but we are of opinion that it would be better that this form should be amended so as to make the Particulars of Offence correspond with the actual words of the statute.

The appellant was indicted in several counts with aiding and abetting Twiggs in committing acts of indecency with the two children. It was admitted by the prosecution that they could not support those charges, and the Commissioner at the commencement of his summing-up called attention to that fact in these words: "The first case launched is a very serious one, namely, that she had aided and abetted him in these indecencies. That has not been persisted in really." On behalf of the appellant it has been urged before us that, as soon as those charges were abandoned, there was no ground for saying that she contributed by her neglect to the acts of indecency. Even

if there were evidence which would justify the jury in saying that by her neglect she contributed to the acts of indecency, that would not be sufficient to satisfy the words of the statute, which are "wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health." The jury, therefore, had to find and should have been directed that they must be satisfied not merely that the appellant had neglected the child by allowing it to wander about the streets or to go to Twiggs's house or even to sleep in his house, but also that she neglected it in a way which was likely to cause it unnecessary suffering or injury to health. There are no words in the statute—though this almost seems to be implied in the summing-up of the Commissioner—to the effect that it is an offence to neglect a child in a manner likely to cause injury to its morals. The Commissioner, in dealing with this point, more than once undoubtedly led the jury to believe that the issue was whether the appellant by her conduct had neglected the child in a way which contributed to the indecencies to which it had been subjected. He goes on to say: "She says she did not know, and I do not suppose she knew, the lamentable practices which went on. She did not know the beastliness, if it was, which this man was subjecting her child to." Later in the summing-up he said: "If you think she was quite innocent in the matter, and she was foolish but no more, then acquit her. On the contrary, if you think it was owing to her laxness because she allowed the child to go and sleep with this man in his bed, if you think she contributed to it and exposed the child to the indecencies to which she was subjected, then your duty will be to find her guilty." Upon that direction it is to be observed that when the jury were asked: "Do you find

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the prisoner, Sarah Ann Walker, guilty of an offence in this indictment and, if so, what?" the answer was "Guilty of neglect"—a verdict which appears to be quite consistent with the view that the appellant should be convicted merely because she had been guilty of some kind of neglect. The jury ought to have been directed in accordance with the words used in SENIOR, [1899] 1 Q. B. 283, at p. 290—a decision of the Court for Crown Cases Reserved, consisting of six Judges. The Lord Chief Justice (Lord Russell of Killowen) there said: "Whether the words in the statute [Prevention of Cruelty to Children Act, 1894 (repealed)], 'wilfully neglects,' are taken together, or, as the learned Judge did in directing the jury, are taken separately, the meaning is very clear. 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it." If that direction had been given to the jury they would have had to find whether the appellant deliberately and intentionally neglected this child in a manner likely to cause it unnecessary suffering or injury to its health. No such direction was given, and we are of opinion for this reason that this conviction cannot stand. The appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the Crown: The Town Clerk, Lincoln.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE CHARLES.

DOUGLAS WALTER ATKINSON.

1934.
29 *January.*

Perjury—Evidence—Corroboration—Chief Witness for Crown Admittedly a Perjured Accomplice—Necessity for Direction on Worthlessness of Her Evidence—Other Evidence Insufficient—Conviction Quashed—Perjury Act, 1911 (1 & 2 *Geo.* 5, *c.* 6), *s.* 13 (*a*).

On the trial of the appellant for perjury, the only witness who gave direct evidence of the falsity of the appellant's statement was herself admittedly a perjured accomplice.

Held, the jury should have received the strongest possible warning that her evidence was of no value, and as it was not possible to say that, if that warning had been given, the other evidence relied on by the prosecution was such that the jury must have convicted, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted on November 23, 1933, at the Central Criminal Court of perjury and subornation of perjury and was sentenced by Hawke, J., to fifteen months' imprisonment in the second division.

The indictment contained three counts. The first count charged the appellant with perjury, the Particulars of Offence being "Douglas Walter Atkinson on April 5, 1932, being lawfully sworn as a witness in a judicial proceeding, to wit in a suit for the divorce of his wife Irene Rose, unlawfully and wilfully did make a statement which he

(*a*) By the Perjury Act, 1911, s. 13: "A person shall not be liable to be convicted of any offence against this Act . . . solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

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knew to be false and did not believe to be true, to wit did falsely swear that on the night of August 21, 1930, in company with a Miss Inall and a Miss Billingham he had witnessed an act of adultery between his wife and an unknown man on the Lower Sandgate Road at Folkestone." The second count charged him with suborning Olive Billingham, a witness in the above suit, to commit perjury to the same effect, and the third count charged him with committing perjury to the same effect in proceedings in the Divorce Court on May 26, 1933, after the intervention of the King's Proctor.

The following statement of facts is, in substance, taken from the judgment:

The appellant had filed a petition in order to obtain a divorce from his wife. In those proceedings he alleged that she had committed adultery on the night of August 21, 1930, and that he, in company with Miss Inall and Miss Billingham, had witnessed the act, which had taken place near a road in Folkestone. Miss Billingham was a witness in those proceedings and swore that she was with the appellant and Miss Inall on the night of August 21, 1930, at Folkestone and had witnessed the act. The suit was not defended, and the appellant obtained a decree *nisi*, but in November, 1932, the King's Proctor intervened and further proceedings took place, the decree *nisi* was set aside, and ultimately the appellant was prosecuted for perjury.

On the trial of the appellant the main witness called for the prosecution to prove the perjury and the only witness who gave direct evidence against him was Miss Billingham. She swore then that she had never been at Folkestone or witnessed any act of adultery, and that she had been suborned by the appellant to commit perjury. Miss Inall and the appellant both gave evidence to the effect that they had been to Folkestone and seen the act of adultery by the appellant's wife and that this took

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place on August 22, 1930. The appellant gave evidence that on the day following he went from Folkestone to Angmering.

Laurence Vine, for the appellant:

The only ground of appeal relied upon is that there was no, or alternatively no sufficient, corroboration of the one witness who gave evidence of the alleged perjury. That witness was herself an accomplice, and the corroboration in this case should therefore have been of the strongest possible nature.

[THE LORD CHIEF JUSTICE: She was not only an accomplice, but also herself a perjurer.]

The corroboration relied upon appears to have consisted of three matters: (i) in October, 1930, the appellant consulted an inquiry agent with regard to divorce proceedings against his wife and did not tell him about the act of adultery which he himself had previously witnessed; (ii) about Christmas, 1930, the appellant endeavoured to obtain from a man named Tillman a confession of adultery with the appellant's wife; (iii) the appellant fixed the date of the alleged adultery by a journey which he had made from Folkestone to Angmering on the following day, and the prosecution sought to show by the issue of railway tickets that he could not have made the journey as alleged, and relied on conflicting statements by the appellant with regard to this journey. None of these matters afforded any real corroboration of Miss Billingham's evidence and the jury should have been clearly warned that Miss Billingham was not merely an accomplice, but an accomplice who had herself committed perjury. When the submission was made on behalf of the defence that there was no case to go to the jury, the Judge made certain observations with regard to the Court of Criminal Appeal being able to rectify any wrong ruling in law and these may have lessened the responsibility of the jury.

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Eustace Fulton, for the Crown:

The question for the jury was whether there was evidence which they accepted other than Miss Billingham's, and whether that other evidence was sufficient to satisfy them that the appellant had committed perjury. They were entitled to look at the whole facts of the case, including the extraordinary manner in which the appellant, according to his own story, set out to obtain evidence of his wife's adultery, and the conflicting statements he made about his journey from Folkestone to Angmering on the following day. The whole case for the prosecution was based upon the assumption that Miss Billingham had committed perjury and it was therefore not necessary for the Judge to tell the jury that she was to be regarded as a perjured accomplice.

Laurence Vine, in reply:

The case should have been left to the jury on this footing: was there a complete case against the appellant if the evidence of Miss Billingham was ignored?

THE LORD CHIEF JUSTICE [after stating the terms of the indictment]: The appellant appeals against his conviction upon a point of law, and his point is, as was contended at the trial, that the case ought not to have been left to the jury, because Miss Billingham's evidence was the only direct evidence against him, and the Perjury Act, 1911, provides that there shall not be a conviction on the evidence of one witness alone, and moreover Miss Billingham was an accomplice. There is no doubt as to the law on the matter. [His Lordship read section 13 of the Perjury Act, 1911, and continued:]

The importance of corroboration in such a case is not less than its importance under the Bastardy Acts. Reference may be made to the judgment of Avory, J., in THOMAS *v.* JONES, [1920] 2 K. B. 399, at p. 409: "In my opinion this case is of a class in which it is peculiarly

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necessary that the requirements of the statute as to corroboration should be strictly complied with, and in my view there was no evidence, apart from that of the respondent herself, which was not consistent with the innocence of the appellant, or which tended to prove that he was the father of the child."

[His Lordship then stated the facts and evidence at the trial as summarised above, and continued:] It is manifest in those circumstances that Miss Billingham was not only an accomplice but, if the case for the Crown was right, an accomplice who had herself, on her own confession, committed perjury. The question remains what is the proper course to take where reliance is sought to be placed on the evidence of an admittedly perjured accomplice. No doubt, that evidence is receivable, but, in the opinion of the Court, the strongest possible warning ought to be given to a jury not to act upon such evidence. In other words, the proper warning to be given and the proper way of testing the evidence against the appellant is to ask this question—if Miss Billingham's evidence be wholly eliminated, is there here a case sufficient to establish that the appellant did in fact commit perjury and suborn perjury.

A document which was referred to in the court below seems to have attracted less attention than it may have deserved. A letter headed June 16, 1933, was signed by the appellant and addressed to Miss Billingham. After saying: "The last thing I want to do is to give you any more worry in any way," he went on to say something which Miss Billingham has cut out. There remains at the end of a line the letters "ey" which would obviously be an ending of the word "journey" and those letters do not appear at the end of the last line, but there is evidently another line below and the last letter of that line, the letter "e," remains. No satisfactory explanation was given by Miss Billingham upon the trial of the appellant

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as to the reason why she mutilated that letter. On the other hand Miss McFarlane, who typed out the letter for the appellant, said that the words written were: "Do you know which day you took the journey to Folkestone and met Miss Inall and myself when we all saw the adultery committed, also the exact date?" It is a remarkable fact that this letter has been mutilated in this way by the chief witness for the prosecution, and it is to be observed that at the trial of the appellant for perjury Miss Inall repeated the account which she had previously given. We are told that Miss Inall has not been prosecuted for perjury.

If the evidence of Miss Billingham is eliminated or ignored, what is the case for the prosecution apart from her evidence? The case consists really of three matters. The first is that in October, 1930, the appellant was employing an inquiry agent, a Mr. Hale, to watch his wife, but, according to Mr. Hale, the appellant never told him that he had seen the act of adultery in the previous August or that he had witnesses to the act. Is that evidence conclusive of the guilt of the appellant? Is not it equally consistent with his innocence? By that time he had apparently heard of adultery with a man unknown, and it may well be that he desired to have a co-respondent whom he could name and against whom he might be able to recover damages. The second point is that about Christmas, 1930, the appellant saw a man named Tillman, who gave evidence at the trial, and, according to Tillman's evidence, the appellant asked him to sign papers saying that he, Tillman, had committed adultery with the appellant's wife, and the appellant offered him £25, but Tillman refused to sign. The contention for the prosecution was that in that manner the appellant was seeking to buy a confession from Tillman. The appellant said that that was quite untrue and that what he was seeking to do was to obtain from Tillman a confession of that which he believed Tillman had done and that he offered him

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£10. No doubt that was a foolish and reprehensible act, but can it be said to be satisfactory evidence that the appellant has committed perjury?

Finally, there was an argument pointedly directed by Mr. Fulton to the issue and non-issue of railway tickets on August 22 and 23, 1930, and it certainly appears that the appellant in his evidence changed the date of his journey. Does it follow that he changed it dishonestly? In the letter he wrote to Miss Billingham on June 16, 1933, he said: "I am doing all I can to appeal. I now find I can prove that the 22nd was the correct day, the publicity has caused people to write to me."

In the opinion of the Court, if the jury had been directed to ignore the evidence of Miss Billingham as being the evidence not merely of an accomplice, but of an accomplice who, on her own confession, had committed perjury, they would then have had to consider whether the rest of these somewhat nebulous matters were sufficient to establish the guilt of the appellant. In our opinion it is not possible to say that if the jury had been so directed, they must certainly or would inevitably have arrived at the conclusion at which they did arrive. The Court is of opinion that this verdict was unsatisfactory and cannot be supported, regard being had to the evidence in this case. On that ground this appeal must be allowed and this conviction quashed.

Conviction quashed.

Solicitors for appellant: Ludlow & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROCHE.

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12 *February.*

REGINALD MAUGHAN.

Indecent Assault on Female—Girl under Sixteen—Reasonable and bona fide belief that Girl was over Sixteen—Defence never available—Criminal Law Amendment Act, 1922 (12 & 13 *Geo.* 5, *c.* 56) *ss.* 1, 2 (*a*).

On a charge of indecent assault on a girl under sixteen years of age, a reasonable and *bona fide* belief that the girl was over the age of sixteen can never be an available defence.

FORDE (17 Cr. App. R. 99; [1923] 2 K. B. 400) and PRINCE [1875] (2 C. C. R. 154) followed and applied.

Appeal against conviction (on certificate).

The appellant was charged at Kent Assizes on an indictment containing six counts, three of which charged him with carnal knowledge of a girl above the age of thirteen and under the age of sixteen years on three different occasions, and the remaining three with indecent assault upon the same

(*a*) By the Criminal Law Amendment Act, 1922, s. 1: "It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecency." By s. 2: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under section 5 . . . of the Criminal Law Amendment Act, 1885. . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section."

Section 5 of the Criminal Law Amendment Act, 1885, prohibits the carnal knowledge of girls above the age of thirteen and under the age of sixteen years.

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girl. The indecent assaults alleged were the same as the acts of alleged carnal knowledge. The appellant, who was twenty-two years of age, was found not guilty on the counts which charged carnal knowledge, and guilty on the counts which charged indecent assault, and on November 23, 1933, was sentenced by Charles, J., to two days' imprisonment. Charles J., granted a certificate on the following grounds: (i) that it was apparent from the verdict of not guilty returned by the jury on the charges of carnal knowledge that the jury came to the conclusion that the prisoner, although he had had connection with a girl under the age of sixteen, *bona fide* and on reasonable grounds believed her to be a consenting woman over the age of sixteen, and it was desirable to know whether such belief on the part of the prisoner afforded him any defence to a charge of indecent assault; (ii) that the jury were directed that although, if the prisoner believed on reasonable grounds that the girl was over the age of sixteen, they should acquit him on the charges of carnal knowledge, his *bona fide* and reasonable mistake of fact as to her age afforded him no defence either by statute or at common law to a charge of indecent assault, and it was desirable to know if that direction was correct in point of law; (iii) that having regard to the evidence and to the verdict of the jury on the charges of carnal knowledge, it was desirable to know whether the verdict of guilty on the charges of indecent assault could be sustained.

Garth Moore, for the appellant:

No reliance is placed on the proviso to section 2 of the Criminal Law Amendment Act, 1922. In FORDE (17 Cr. App. R. 99; [1923] 2 K. B. 400) it was held in precisely similar circumstances that the above proviso gave no defence to the charge of indecent assault, but the point which is to be taken here was not taken in that case. The point is that, in such circumstances, there is at common

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law, and apart from the statutes in question, a defence based on bona fide mistake of fact. Such a defence was held to be available in GREEN (1862), 3 F. & F. 274 and HIBBERT (1869), 1 C. C. R. 184. Those two cases were referred to in the well-known case of PRINCE (1875), 2 C. C. R. 154. It is not altogether easy to say what is the proper interpretation to be placed on that case, but it is submitted that one commonly accepted interpretation is wrong, namely that the defence of bona fide mistake of fact was taken away by the fact that the accused knew that he was doing an immoral act.

[AVORY, J.: Was not the real ground of the decision that the prisoner had done the thing which was forbidden by the statute, and that it was not necessary to prove any further *mens rea*?]

In TOLSON (1889), 22 Q. B. D. 168 the prisoner had done something absolutely prohibited by the statute, and yet the defence was held to be good. It is no longer possible to contend that bona fide mistake of fact is always an overriding defence; regard must be had to the terms of the particular statute, in order to see whether this defence is available or not. Here what is primarily forbidden is an assault, that is to say, something done against the will of the person assaulted.

A. J. Baxter, for the Crown, was not called on to argue.

AVORY, J.: This appellant was indicted at Kent Assizes on an indictment which charged him with unlawfully and carnally knowing a girl above the age of thirteen and under the age of sixteen years on three different occasions, and he was further indicted in other counts with committing an indecent assault upon the same girl at the same time and place. He was put upon his trial after a plea of not guilty, and was found not guilty by the jury on the three charges of carnal knowledge of the girl on the ground that

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he came within the proviso to section 2 of the Criminal Law Amendment Act, 1922. [His Lordship read it and continued:] Under the directions of the Judge the jury found the appellant guilty of indecent assault on the remaining counts. Mr. Moore has invited the court to say that the Judge was wrong in his direction to the jury and that he ought to have left the case to the jury to say whether the appellant had reasonable cause to believe that the girl was over sixteen, and that if the appellant had that belief, it would be an answer to the charge of indecent assault.

The argument which has been put forward by Mr. Moore cannot be given effect to in view of the decision of this court in FORDE (17 Cr. App. R. 99; [1923] 2 K. B. 400), a case in which the very point in question here was raised. In that case the appellant, who was under twenty-three years of age, was charged both with carnal knowledge and with indecent assault, and the prosecution admitted that the only indecent assault alleged was the act of carnal knowledge. The Recorder of London granted a certificate of appeal to this court upon the ground that the alleged indecent assault "consisted solely in the act of carnal knowledge of a girl under sixteen by a man under twenty-three who had, in law and in fact, a complete defence to such act of carnal knowledge."

It is not necessary to read any part of the judgment, except one passage (17 Cr. App. R. at p. 103; [1923] 2 K. B. at p. 404) in which it was said: "The result of this legislation is that a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible answer if he is charged with indecent assault and not with the full offence." It was hoped at the time when that judgment was delivered that the legislature would take notice of the apparent absurdity resulting from this state of legislation and that it would be amended. That

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course has not been taken and we can see no reason for adopting any different view in this case from that adopted in FORDE (*supra*).

If any further authority were necessary in answer to the argument put forward by Mr. Moore, it would be found in PRINCE (1875), 2 C. C. R. 154. In that case a man was charged with abducting a girl under sixteen years of age and the same suggested defence was put forward—that he did not know she was under sixteen, and that he *bona fide* believed she was sixteen or over, yet the court held that, the act having been absolutely prohibited by statute, the man who did the act took the risk of offending against the statute. So here the legislature says that it shall be an offence for a man to commit an act which amounts to an indecent assault on a girl under sixteen years of age whether she consents or not.

We think, therefore, that no effect can be given to the argument of Mr. Moore in this case and that the appeal must be dismissed. No question arises with regard to sentence, because the Judge passed a nominal sentence of two days' imprisonment, which ran from the first day of the assizes and therefore resulted in the immediate discharge of the appellant.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE LAWRENCE.

FRANCIS HENRY MOUNT.
JAMES ROBERT METCALFE.

1934.
5 March.

Evidence—Shopbreaking—Three Prisoners Charged jointly—Wife of one called as Witness by Prosecution—Not a Competent Witness—Convictions quashed.

Three prisoners were charged jointly with shopbreaking, and all were convicted. The wife of one of the prisoners was called as a witness for the Crown, and, after stating that she was willing to give evidence, gave evidence which was vital to the case against the other two prisoners. These two prisoners appealed.

Held, as the wife of the third prisoner was not a competent witness for the prosecution, the convictions must be quashed.

Appeals against conviction.

The appellants, together with a man named Irving, were charged at Salford Hundred Quarter Sessions on January 24, 1934, with shopbreaking and larceny. All three prisoners were convicted, and the appellants were sentenced by the Chairman as follows: Mount to eighteen months' imprisonment with hard labour, and Metcalfe to three years' penal servitude.

At the trial Mrs. Irving, the wife of the prisoner Irving, was called as a witness for the prosecution. She was asked if she was willing to give evidence and replied that she was. She then gave evidence of a conversation at her house on the afternoon before the offence was committed between all three prisoners, and deposed that Metcalfe had said to the other prisoners: "I've a job spotted; I'll try to pull it off." The Chairman, in his summing-up, referred to the

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evidence of Mrs. Irving as "very pointed evidence," and her evidence was the only evidence against the prisoner Mount.

J. P. Ashworth, for the appellants:

Mrs. Irving was not a competent witness, and the fact that she gave evidence for the prosecution was a grave irregularity, especially in view of the fact that her evidence was, as the Chairman described it, "very pointed evidence." [He was stopped.]

Mervyn J. E. Morgan, for the Crown, did not seek to support the conviction.

CHARLES, J.: These appellants, together with a man named Irving, were found guilty at Salford Hundred Quarter Sessions on a charge of shopbreaking, and were sentenced by the Chairman—Mount to eighteen months' imprisonment with hard labour, and Metcalfe to three years' penal servitude.

They were not represented at the trial, and as the trial proceeded it occurred to somebody to call Mrs. Irving, the wife of one of the prisoners—a procedure which was completely irregular. She gave evidence, which was referred to by the Chairman in his summing-up as being very pointed evidence indeed. It certainly was pointed evidence, for the witness said that all three prisoners met at her house on the afternoon before the shop was broken into, and that Metcalfe said: "I've a job spotted; I'll try to pull it off," and she gave further evidence of later conversations about watches and rings between Metcalfe and Irving and Irving and Mount. All that evidence was absolutely inadmissible. It has long been held that at common law a wife is not only not a compellable, but not even a competent, witness against her husband. That principle was enunciated with regard to a case where prisoners are charged jointly in THOMPSON (1872), L. R. 1 C. C. R. 377, where it was made

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quite clear that, where two or more persons are indicted jointly, the wife or husband of any such defendant is not an available witness against any co-defendant. Indeed, save for certain exceptional cases which are to be found in the Schedule to the Criminal Evidence Act, 1898, that rule of common law is absolute and undisturbed. The evidence of Mrs. Irving was really vital to the case and, so far as Mount was concerned, it was the only evidence which could be found against him.

In these circumstances, the admission of the evidence of Mrs. Irving, who was not a competent witness upon the occasion, was, in the opinion of the Court, fatal to these convictions. We have come to the conclusion that these appeals must be allowed and these convictions quashed.

Convictions quashed.

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Evidence—Confession—Admissibility—Allegation of Threats—Reliance by Recorder on Depositions—Evidence as to Threats heard in Presence of Jury—Conviction quashed.

Where an alleged confession by a prisoner is tendered in evidence by the prosecution and objection is taken by the defence to its admission on the ground that it has been induced by threats, it is not permissible for the Judge to decide the issue whether such threats have been made or not by reference to the depositions. The proper course is for the Judge to hear evidence on that issue in the absence of the jury, and upon that evidence rule whether the confession should be admitted or not.

Appeal against conviction and sentence.

The appellant was convicted at Salford City Quarter Sessions on January 8, 1934, of housebreaking and larceny, and was sentenced by the Recorder to three years' penal servitude.

The principal evidence relied upon by the prosecution was an alleged confession by the appellant in the following circumstances. The appellant was brought to the police station on the evening of November 7, 1933, and at 7.30 p.m. was seen by Detective-Sergeant Howarth. The detective-sergeant, who was called as a witness at the trial, was asked whether he had put certain questions to the appellant, and replied: "Yes. I was questioning him with regard to recent cases of housebreaking in this city." The sergeant was then asked "What did he say?" and replied: "He said: 'Look here, sergeant, you have always been decent to me.'" Counsel for the defence then objected, and the Recorder asked what his objection was. Counsel said that his objection was that the prisoner had been induced to say whatever he did say then by means of threats. The Recorder then said to the sergeant: "Tell us what occurred," and the sergeant replied: "Knowing

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him I said: 'Hullo, Billy. I am going to question you regarding certain cases of housebreaking in this city, but before I do I must caution you, and you need not say anything in answer to my questions unless you wish to do so, but anything you say will be taken down in writing and may be given in evidence.' Before I could ask him any questions, he said 'Look here, sergeant.'" The Recorder then said: "You must not tell us that until I rule upon the objection. I rule that this evidence is admissible. You [defending counsel] have your remedy elsewhere."

The alleged confession was then admitted in evidence. At a later stage of the trial the Recorder, in the presence of the jury, heard evidence on the question whether the alleged threats by the police to the appellant had or had not been made.

R. Lambert, for the appellant:

The case for the prosecution depended largely on the admissibility of an alleged confession by the defendant. When that confession was tendered in evidence and objection was taken to it by the defence on the ground that it had been induced by threats, the Recorder declined to receive evidence or hear argument on the issue whether or not threats had been made. He was not entitled to rule that the confession was admissible without satisfying himself by evidence that no threats had been made. [He was stopped.]

P. M. Oliver, for the Crown:

The question of the confession having been induced by threats was raised at the police court, and appeared upon the depositions. The Recorder referred to the evidence there disclosed, and appears to have based his ruling on that evidence.

LAWRENCE, J.: In this case the appellant was found guilty on two charges of housebreaking and larceny, and

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JOHN WILLIAM CHADWICK.

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was sentenced to three years' penal servitude. The principal evidence against him was his own confession, and the question which we have to consider here is the way in which that confession was admitted in evidence. [His Lordship then referred to the circumstances in which the alleged confession was made, and the evidence with regard to it, as set out above, and continued:] At a later stage in the trial when counsel for the defence again raised the objection that this confession had been obtained by threats, the evidence as to those threats was given in the presence of the jury. It is argued on behalf of the prosecution that the Recorder was entitled to form an opinion as to the admissibility of this confession from what he had seen on the depositions, the question of threats having been raised in the Court below. The rule was laid down long ago that a confession must be proved affirmatively by the prosecution to have been voluntarily made. We think that it is altogether wrong for the Judge, who has to decide upon the admissibility of a confession, to decide the question upon the depositions, which are not evidence before him.

We think that there are other objections to the admission of this confession. It appears that the Recorder decided, upon reading the depositions, to admit this confession without hearing any evidence or argument, and that at a subsequent stage he heard evidence in the presence of the jury which would properly have been heard in the absence of the jury. We think there was a further objection to the decision of the Recorder to admit this confession, namely, that language was used by the police officer suggesting that the prisoner had a criminal past. We think that in this case it was not affirmatively proved by the prosecution that the confession was voluntarily made, and that in the circumstances the conviction cannot stand. The appeal must, therefore, be allowed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LAWRENCE.

ALBERT BARROW.

1934.
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Receiving Stolen Goods—Possession—Evidence of possession of Cheque given in payment for Stolen Goods—Not sufficient to justify charge.

Evidence that a prisoner has been in possession of a cheque given in payment for the purchase of stolen goods is not sufficient evidence of possession of the stolen goods to justify a charge of receiving them knowing them to have been stolen.

Appeal against conviction.

The appellant was convicted at London Sessions, on January 18, 1934, on charges of receiving two walnut burr veneers and of receiving twenty-two bundles of walnut burr veneers, knowing them to have been stolen, and was sentenced by the Acting Deputy-Chairman to nine months' imprisonment with hard labour.

The appellant was indicted with two other men named Melson and West. No evidence was offered against Melson; West was tried together with the appellant and was also convicted. Evidence was given to the following effect: On the night of October 30-31, 1933, a warehouse at Clapton was broken into and a large quantity of walnut burr veneer stolen; on November 8 West left a sample of this veneer with an employee of Melson, requesting him to show it to his employer; on November 10 West called on a timber merchant named Simons and asked him to cash a cheque which he produced. The cheque was for £22, and drawn by Melson Brothers in favour of G. H. White, and was indorsed by West in that name. After telephoning to

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Melson Brothers, Simons agreed to cash the cheque for £20, and paid West £10 on account. Detective-Sergeant Irons gave evidence that on November 15 he was talking to Melson at his factory, when the appellant came in; that the appellant was told that Irons was a police officer, and said: "It is all right; I have come to ask if the cheque is in order. They sold some veneers to Mr. Melson last Friday and he gave a cheque for £22. I have not had the money yet and I want to know if it is all right"; that when asked who "they" were, the appellant replied: "I do not know them; they brought the cheque to me and I cashed it for them. I have given it to another man to cash for me, as I have no banking account; I do not know him and I have not seen him since. They brought the veneer to Melson; I did not," but that later the appellant said: "I am sorry I told you I did not know who brought the cheque. It was a man named West. . . . He told me he had sold some veneers and got a cheque which he could not change, so I changed it for him. I gave him £10. I gave the cheque to another man and I have not seen him since." It was submitted on behalf of the appellant that there was no evidence that he was ever in possession of the stolen goods, but that submission was overruled.

L. A. Moules, for the appellant:

There was no evidence that the appellant was in possession of the stolen goods. His alleged statements only amounted to admissions that he was dealing with the proceeds of the goods. Negotiation for the sale of stolen property has been held not to be sufficient to justify a conviction for receiving: WATSON (12 Cr. App. R. 62; [1916] 2 K. B. 385). Further, no warning was ever given to the jury that West's evidence was that of an accomplice and accordingly required corroboration. It was, in fact, contradicted in two or three places by the evidence called for the prosecution.

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C. G. L. Du Cann, for the Crown:

It is conceded that the evidence of possession on the part of the appellant was slight, but this case can be distinguished from WATSON (*supra*). In that case there was merely a negotiation for sale, while here the appellant after the sale was endeavouring to find out if the transaction was correct, and was saying that the document of title was his concern. From the fact that the appellant tried to shield the man who had had possession it might fairly be assumed that he himself had had possession together with that man. It is admitted that a warning with regard to the evidence of an accomplice ought to have been given, but the case for the prosecution did not depend on the evidence of West, nor did the summing-up treat West's evidence as essential to the case against the appellant. Further the jury convicted West, and therefore must be presumed to have disregarded his evidence as incriminating the appellant.

AVORY, J.: The appellant was charged with two other persons, one of whom was named West, with receiving two walnut burr veneers between October 30 and November 2, 1933, and twenty-two bundles of walnut burr veneers between October 30 and November 10, in each case knowing the goods to have been stolen. He was convicted and sentenced to nine months' imprisonment with hard labour. Leave to appeal was given on the grounds (i) that there was no sufficient evidence that the appellant ever was in possession of the stolen goods, and (ii) that if West's evidence were true, he was an accomplice, and that no warning was given to the jury that they should not accept his evidence, unless they found that it was corroborated in some material particular implicating the accused.

With regard to the first point, there was undoubtedly evidence that the appellant was in possession of a cheque which had been given in payment for the stolen goods.

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That fact of itself, although creating a suspicion that the appellant had had some dealing with the stolen goods is not, in the opinion of the Court, sufficient evidence that he was actually in possession of them, so as to justify a charge of receiving. It may well be that, if both the appellant and West had been charged with stealing in concert with each other, the appellant as an accessory before the fact, there would have been sufficient evidence to justify the conviction of the appellant, but upon the charge of receiving it was essential to prove that the appellant actually was in possession of the goods either manually or constructively, and we have come to the conclusion that there was in this case no evidence sufficient to justify the conviction.

Further, it was admitted by Mr. Du Cann that no warning was given to the jury against accepting the evidence of the accomplice West without corroboration. It is quite true, as Mr. Du Cann points out, that the jury convicted West and obviously did not accept his evidence as a whole, but we cannot infer from that that they were not in any degree influenced by the evidence of West against the appellant. A warning was necessary and, in its absence, we cannot hold that the jury were properly directed.

On both grounds, therefore, we think that this appeal succeeds and that the conviction must be quashed.

Conviction quashed.

Solicitors : F. A. Cox, for appellant; Wright & Son, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

HENRY LAMB.

1934.
19 *March.*

Bigamy—Proof of first marriage—Marriage in Register Office by Certificate after Notice—Notice given in false name with Knowledge of other Party—Whether marriage invalidated—Marriage Act, 1836 (6 & 7 *Will.* 4, *c.* 85), *ss.* 4, 42 (*a*).

On a charge of bigamy, it was proved that the appellant's first marriage had taken place in a register office by certificate after notice, and that the appellant with the knowledge and consent of the other party had given the notice in a false name.

Held, the marriage was not thereby invalidated.

Re RUTTER, DONALDSON *v.* RUTTER, [1907] 2 Ch. 592, and PLUMMER *v.* PLUMMER, [1917] P. 163, followed.

Appeal against conviction (on certificate).

The appellant pleaded guilty to bigamy at Chester Assizes on February 6, 1934, and was sentenced by Atkinson, J., to four days' imprisonment.

(*a*) Marriage Act, 1836, s. 4: "In every case of marriage intended to be solemnised in England . . . according to any form authorised by this Act, one of the parties shall give notice under his or her hand . . . to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, . . . and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time not being less than seven days during which each has dwelt therein, and the . . . building in which the marriage is to be solemnized. . . ."

Section 42: "If any persons shall knowingly and wilfully intermarry . . . under the provisions of this Act . . . without due notice to the superintendent registrar, or without certificate of notice duly issued, . . . the marriage of such persons, . . . shall be null and void. . . ."

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The appellant married his wife at the Leigh Register Office on April 23, 1914. The marriage was by certificate after notice, and the appellant, with the knowledge and consent of the woman, gave notice in the false name of Henry Critchley, and that name appeared in the certificate. The appellant last lived with his wife in 1924. They then parted, but in 1931 and 1933 the appellant communicated with her by letter. On June 24, 1933, the appellant went through a form of marriage with a woman named Mary Alice Williams at S. Mary's Roman Catholic Church, Heaton Norris. The appellant on that occasion gave his real name.

The appellant at first pleaded guilty, but on the advice of the Judge withdrew that plea, and counsel was assigned to him in order that a point of law on the validity of the first marriage might be argued. After that point had been fully argued and the submission in law made on behalf of the appellant had been decided against him, the appellant again pleaded guilty and was sentenced as above stated.

Atkinson, J., granted a certificate for appeal "on the ground of law whether the marriage was void or not."

J. F. Marnan, for the appellant:

It is submitted that the first marriage was invalid by reason of the fact that the appellant gave a false name, to the knowledge of his wife. It appears to be common ground that, where a marriage is by publication of banns and a false name is given, there is no publication at all and the marriage is rendered invalid. On the other hand, where a marriage is by licence of the registrar, the marriage is not invalidated by the giving of a false name, though the person who gives the false name is rendered liable to penalties. The present case appears to lie midway between the two principles. It is submitted, however, that the notice required in the case of such a marriage is equivalent

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to the publication of banns, the element of publicity being common to both. Without publicity, there could be no guarantee that some existing impediment might not remain undisclosed. The question whether notice in a false name is to be regarded as any notice at all was expressly left open by a dictum of Lord Penzance in HOLMES *v.* SIMMONS (L. R. 1 P. & D. 523, at p. 529). It is conceded that *Re* RUTTER, DONALDSON *v.* RUTTER, [1907] 2 Ch. 592 appears at first sight to be directly against the argument now put forward, and Atkinson, J., evidently felt that he was bound by that decision, but it is submitted that that case was really decided on its own facts. In PLUMMER *v.* PLUMMER, [1917] P. 163, which was a case of marriage by licence, Lord Penzance's dictum in HOLMES *v.* SIMMONS (*supra*) was referred to as being entitled to great weight.

Francis J. W. Williams, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at Chester Assizes to a charge of bigamy and was sentenced to four days' imprisonment. He now appeals, upon certificate granted by the Judge at the trial, against his conviction. The ground of appeal is that the first marriage was void. At the assizes the appellant originally pleaded guilty, and that plea on the suggestion of the Judge was altered to a plea of not guilty. Evidence was then called, and, after argument, the appellant again pleaded guilty, the point of law having been decided against him.

The point which was and is urged on behalf of the appellant is that he married his first wife in a register office, after notice and certificate, under a name which was to her knowledge false. The argument is that, in those circumstances, upon the true construction of the relevant statutes and the true view of the decided cases, that first marriage was a mere nullity. [His Lordship then summarised the facts as above stated, and continued:] It has been in-

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geniously argued by Mr. Marnan on behalf of the appellant that the first marriage ceremony was invalid on the ground that a notice in a false name is not a "due notice" under section 4 of the Marriage Act, 1836, and, therefore, that under section 42 of that statute the marriage was null and void. We have carefully considered the relevant statutes and cases to which reference has been made and, in the opinion of the Court, it is a little unfortunate that a suggested distinction as to the meaning of "due notice" between marriage after publication of banns and marriage after notice and certificate in a register office should ever have been drawn. Such a distinction, as it seems to us, was never intended by the Legislature, and the root of this controversy is to be traced to an extremely guarded obiter dictum of Lord Penzance in HOLMES *v.* SIMMONS, who said (L. R. 1 P. & D. 523, at p. 529): "Whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all may possibly still be a question." That guarded dictum was considered in *Re* RUTTER, DONALDSON v. RUTTER, [1907] 2 Ch. 592, where Swinfen Eady, J., held that a marriage was valid, notwithstanding that the maiden name given by the wife before the Registrar was false to the knowledge of both spouses. That case was carefully considered ten years later by the Court of Appeal in PLUMMER *v.* PLUMMER, [1917] P. 163, where, at page 171, Bankes, L.J., after referring to the dictum of Lord Penzance in HOLMES *v.* SIMMONS (*supra*), said:—

"He merely left that point open as a matter for further consideration. But it seems to me that there is no principle upon which the distinction at which the learned Judge hinted can be drawn."

Warrington, L.J., in the same case, said at page 173:—

"It seems to me, therefore, that in a case of marriage by licence under the express terms of the Statute, although the notice or declaration may be wilfully false, yet the

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marriage itself will be valid, the means resorted to by the Legislature for protecting the public and the parties concerned against such false notice being the imposition of extremely severe penalties upon those who sign a false notice or make a false declaration."

The position, therefore, is that counsel for the appellant, not without courage, is asking this Court to give the "go-by" to the decision in *Re* RUTTER, DONALDSON *v.* RUTTER (*supra*), approved as that decision clearly was by the Court of Appeal in PLUMMER *v.* PLUMMER (*supra*). That is an invitation which we cannot accept. We feel that we must follow those decisions and that, therefore, this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

CECIL HYDE.

1934.
27 *March.*

Indictment—Arson of Goods in Building—Words "under such circumstances that if the building were thereby set fire to the offence would amount to felony" omitted—Insufficiency—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97) *s.* 7 (*a*).

The appellant was convicted on a count of an indictment for arson of goods in a building, contrary to section 7 of the Malicious Damage Act, 1861. The Particulars of Offence alleged that he "unlawfully and maliciously set fire

(*a*) Malicious Damage Act, 1861, s. 7: "Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, . . ."

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to certain straw then being in a building namely, 32, Union-street, Dowlais."

Held, the omission of the words "under such circumstances that if the building had been thereby set fire to the offence would have amounted to felony," rendered the indictment bad in law and the conviction must be quashed.

Appeal against conviction and sentence.

The appellant was convicted at Glamorganshire Assizes on February 15, 1934, of arson of straw in a dwelling-house, contrary to section 7 of the Malicious Damage Act, 1861, and was sentenced by Lawrence, J., to four years' penal servitude. On other counts in the indictment he was acquitted by direction of the Judge.

The count on which the appellant was convicted was in the following terms: "Statement of Offence. Arson, contrary to section 7 of the Malicious Damage Act, 1861. Particulars of Offence. Cecil Hyde on the 7th day of January, 1930, unlawfully and maliciously set fire to certain straw then being in a building namely, 32, Union-street, Dowlais."

George Bankes, for the appellant:

The count of the indictment on which the appellant was convicted was manifestly insufficient. It purported to charge an offence against section 7 of the Malicious Damage Act, 1861, but there was nothing corresponding to the words "under such circumstances that if the building were thereby set fire to the offence would amount to felony."

Christmas Humphreys, for the Crown:

If the count had been in the proper form the jury must inevitably have come to the same conclusion. It is submitted that there has been no substantial miscarriage of justice and that this is a case where the Court might apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907.

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[AVORY, J.: Is there any case where the proviso has been applied where the indictment is so defective that it discloses no offence?] There appears to be no such case.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Glamorganshire Assizes of the crime of arson, contrary to section 7 of the Malicious Damage Act, 1861. The indictment, which is before the Court, contained five counts, and the appellant was convicted on the fourth count. [His Lordship read that count as set out above, and continued:] Mr. Bankes has taken the point briefly, but not the less effectively because briefly, that this count is defective. [His Lordship read section 7 of the Malicious Damage Act, 1861, and continued:] In this count there are no such words as "under such circumstances that if the building were thereby set fire to the offence would amount to felony." To put the matter in another way, this count does not disclose any offence at all. If setting fire to straw in a building were indeed a crime, everyone who put some straw on his fire would be liable to conviction.

Mr. Humphreys has referred us to the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907. That proviso is indeed wide in its terms, but, as he frankly admits, there is no case where it has been applied when the indictment discloses no offence. The verdict of guilty was taken on the fourth count, and the learned Judge said to the jury "If you find him guilty of setting fire to the straw, I am instructing you to find him not guilty on the other counts." The jury then returned a verdict of not guilty on the other counts.

In our opinion, the point taken by Mr. Bankes is a good point and there is no escape from the conclusion that the conviction cannot stand. It may well be that if the indictment had been in the proper form and that if the summing-up had directed the jury to those crucial words—which it omitted to do—the verdict would have been the same.

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This, however, is not a case where the Court can apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907. The appeal must be allowed, and the conviction quashed.

Conviction quashed.

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MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*on behalf of His Majesty*).

Coram : THE LORD CHANCELLOR, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON AND LORD WRIGHT.

Evidence—Prisoner's Character in Issue—Cross-Examination as to Previous Charge Resulting in Acquittal—Admissibility—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*ii*).

Held, by the House of Lords (reversing the decision of the Court of Criminal Appeal) :—As a general rule it is not permissible to cross-examine a prisoner, who has put his character in issue, on a previous charge which has resulted in an acquittal. In most cases the fact of such a charge having been made is irrelevant, in that it neither goes to show tnat the prisoner did the act for which he is being tried nor does it go to his credibility.

There may be exceptional cases in which cross-examination on a previous charge which has resulted in an acquittal may be permissible, in order to elicit a statement or evidence given by the prisoner in the course of the previous trial which tends to throw doubt on the evidence given by him at the subsequent trial.

Even where the question whether a prisoner has been convicted, charged or acquitted goes to his credibility, it ought not to be admitted if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence with which he is charged.

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Appeal by the prisoner from order of the Court of Criminal Appeal dismissing appeal against conviction and sentence.

The appellant, William Maxwell, was convicted at York Assizes on February 27, 1934, before du Parcq, J., of manslaughter and of using an instrument with intent to procure miscarriage, and was sentenced to twenty months' imprisonment.

The following statement of facts is, in substance, taken from the judgment of the Court of Criminal Appeal:

The appellant was a herbalist of the age of seventy-five years, and on October 9, 1933, was visited at his house by a man named Wilson, who was responsible for the pregnancy of a young woman named May Holliday. On the following evening the woman herself, together with Mr. and Mrs. Wilson, visited the appellant, and Wilson, who was a labourer, paid the appellant £4. On November 17 the woman again visited the appellant, and that evening the appellant went to a doctor's house and told him that a patient had collapsed and that he did not know what had happened. The doctor telephoned to a colleague, who went to the appellant's house and found the woman dead, with her feet about ten inches apart, her underclothes pulled up, her knickers pulled down, and her private parts soaked with fluid. The appellant said to a police inspector who came to the house later that evening, "I am unlucky again," and made similar statements to other police officers.

The material portions of the evidence of these officers appear fully in the judgment, as do questions put to the appellant in cross-examination with regard to a previous charge of which he had been acquitted.

The appellant appealed to the Court of Criminal Appeal—The Lord Chief Justice, Mr. Justice Avory and Mr. Justice MacKinnon—who heard the appeal on April 23, 1934.

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Paley Scott, K.C. (*W. A. Macfarlane* with him), for the appellant:

The substantial ground of appeal is that the appellant was cross-examined on a previous charge which had resulted in an acquittal. The cross-examination took place without any previous application to the Judge for leave, although the Judge had expressly refused to allow the matter to be raised at an earlier stage in the proceedings.

[He referred to McLEAN (1926), 19 Cr. App. R. 104.]

The question suggested the inference that the appellant had been rightly charged, but had had the good luck to be acquitted. It is conceded that the appellant's character had been put in issue, but an acquittal is not a legitimate means of attacking a prisoner's character.

[He referred to ELLIS, 5 Cr. App. R. 41; [1910] 2 K. B. 746.]

It is true that the Judge in his summing-up told the jury to disregard the effect of the cross-examination, but if the cross-examination was improper, the mischief caused thereby was incurable: MORRISSEY (1932), 23 Cr. App R. 188. It is possible that in some circumstances an acquittal, if based on certain limited grounds, might be relevant, or that, in view of the reference to "charge" in para. (f) of the proviso to section 1 of the Criminal Evidence Act, 1898 (*a*),

(*a*) The proviso to section 1 of the Act is in these terms:

"(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence

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a prisoner might be cross-examined on a pending charge, but here the only possible object of the question was to create prejudice against the appellant.

J. Willoughby Jardine, K.C. (*Alan Bell* with him), for the Crown:

The appellant had clearly put his character in issue, otherwise the questions complained of would not have been asked. Once character has been put in issue, questions previously rendered inadmissible by the proviso to section 1 of the Criminal Evidence Act, 1898, are necessarily rendered admissible, and a prisoner may accordingly be asked a question tending to show that he has been charged with another offence. WATSON (1913), 8 Cr. App. R. 249, is an authority for the proposition that the leave of the Judge should be asked before the question is put, if it is doubtful whether a prisoner has put his character in issue or whether the nature and conduct of the defence has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, but here the matter was perfectly plain, and it was therefore not necessary to ask the Judge's leave.

Paley Scott, K.C., in reply:

The previous acquittal could have no evidential value as regards the appellant's character. If the argument for the Crown is right, the decision in BARRON (1913), 9 Cr. App. R. 236 must be wrong.

THE LORD CHIEF JUSTICE: This appellant was convicted at York Assizes of the manslaughter of a young woman named May Holliday on November 17, 1933, and also of using an instrument upon her on October 14, 1933, with intent to procure her miscarriage. He was sentenced to

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is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence."

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twenty months' imprisonment and he now appeals against conviction and applies for leave to appeal against sentence.

Mr. Paley Scott has frankly admitted not only that there was a case to go to the jury, but also that upon the evidence it was perfectly open to the jury to convict if they thought proper to do so, subject to the criticism which has been offered upon one aspect alone of the trial.

[His Lordship then summarised the facts as set out above, and continued:] The only matter of substance which has been argued arises in this way. Inspector Huxley saw the appellant on the evening of November 17, and the appellant said to him, "Now, Mr. Huxley, I am unlucky again," and to another officer, "This is another rotten business." Inspector Huxley, after giving his evidence in chief, was cross-examined on behalf of the appellant by Mr. Paley Scott. The question was put to him: "Is it a fact within your knowledge that a patient of his whom he was treating some seven years ago died during the treatment," and the answer was "Yes." The transcript then reads: "*Q.* Not at his house, I think? *A.* No. *Q.* But at a time when the patient was undergoing treatment by him? *A.* *En route* to his house from her home address. *Q.* So far as you know, would that be what he was referring to when he said 'I am unlucky again'? *A.* I should imagine so." Then some discussion took place on further questions to be put to the inspector and a question proposed on behalf of the prosecution: "What happened to William Maxwell consequent upon the death of his patient?" was disallowed. Mr. Paley Scott then said: "Now that that has been asked there may be a misunderstanding. The jury may think that he was convicted of some offence as a result of that. As long as it is quite understood that that did not happen I have no objection. That question would suggest to the minds of the jury that he had been convicted." Thereupon, after further discussion with the Judge, counsel for the prosecution said: "I will leave it

there." The next witness was another police officer, Inspector Mews. He said that the appellant had said: "Well, Inspector Mews, this is another rotten business. She had not been in the house very long. She looked ill when she came in and I just got a bottle and was going to make her some medicine." In cross-examination on behalf of the appellant he was asked: "You knew very well what he was referring to, did you not?" and his answer was "Yes, I had an idea." Later, after further evidence had been given, the appellant himself went into the witness-box and was asked by his counsel: "Have you ever been convicted of any offence in your life?" and his answer was: "No, I have lived a good, clean, moral life." In those circumstances it is not denied and indeed it is expressly admitted that the appellant had put his character in issue. He was cross-examined by counsel for the prosecution and the cross-examination which is complained of is in these terms: "*Q.* This is the second time that sudden death has come to a woman patient of yours, is it not? *A.* Yes. *Q.* The first time was in 1927? *A.* In 1927, yes. *Q.* And you were tried for murder, were you not? *A.* No. *Q.* Were you committed to trial for murder? *A.* No. *Q.* And were you tried for manslaughter? *A.* Something like that; I could not tell you exactly. *Q.* And you were acquitted by the jury? *A.* Yes." Then followed some further questions relating to some of the circumstances of that case. Counsel for the prosecution then asked: "That matter was inquired into at the Assizes at Leeds and you were acquitted by a jury?" and the answer was "Yes."

It is strongly complained by Mr. Paley Scott that that line of cross-examination was not permissible for the reason that it employed a mere charge which culminated in the acquittal of the appellant as material to detract from evidence which had been offered of the appellant's good character. The argument is that cross-examination of that nature was not allowable for the reason that, notwithstand-

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ing the acquittal, the jury might be led to infer that there was nevertheless guilt on the part of the accused person and that the acquittal was not upon the merits but due to good fortune. That argument raises a clear point of law on the construction of part of the proviso to section 1 of the Criminal Evidence Act, 1898. That proviso is divided into a series of paragraphs and para. (f) is as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . ." and there follow three exceptions which are separated not by the word "and" but by the word "or," a scheme which clearly indicates that, if any one of those exceptions or conditions shall be fulfilled, then the provision in para. (f) applies. The second of those exceptions is "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, . . ." Now here it is manifest that the appellant had personally given evidence of good character and by his advocate asked questions with a view to establishing good character, and therefore the only question is whether that which was done here on the part of the prosecution was permitted under the words of para. (f). It is quite obvious that that paragraph in its central part distinguishes three things: "has committed," "has been convicted of," "has been charged with."

The questions which were here asked were questions on the point whether the appellant had been previously charged with some offence other than that wherewith he was then charged. The argument of Mr. Paley Scott is that the mere fact that a charge had been made against the appellant, seeing that that charge terminated in an acquittal, ought not to have been made the subject of cross-examination,

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for the reason that it left a doubt whether the acquittal was or was not right. If that argument is correct, it would seem that in no circumstances can room be found for the words "been charged with" as distinguished from the words "committed" or "been convicted of." It seems indeed a bold argument to allege that it is more prejudicial to an accused person to be asked whether he has been charged and acquitted than to be asked *simpliciter* whether he has been charged. No doubt, as Mr. Paley Scott has said, if counsel for the prosecution had merely asked whether the appellant had been charged with the other offence, it would have been the duty of counsel for the defence immediately to make clear in re-examination that that charge had terminated in an acquittal.

It seems to us that that which was done here was clearly within the terms of para. (f) of the proviso to section 1 of the Criminal Evidence Act, 1898. It is said that so to decide involves the overriding or ignoring of the decision of this Court in BARRON (1913), 9 Cr. App. R. 236, but that case and the present case are not at all *in pari materia*. There the complaint was that inadmissible evidence had been given, namely, evidence of another alleged offence of which the appellant was innocent. What was there said was that in those circumstances to offer evidence affirmatively relating to the other offence might well have left a lingering doubt in the minds of the jury whether the appellant was guilty of that offence of which *ex hypothesi* he was innocent. That case did not turn on the construction of the proviso to section 1 of the Act of 1898. The Court is therefore of opinion that the cross-examination which took place in the present case was quite admissible and that the appellant has no grievance on the ground of having been asked the questions which have been read. In those circumstances it appears that, so far as conviction is concerned, this appeal must fail.

With regard to the sentence, it cannot be said that it

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was in any way excessive. The appellant is a man of many years, but the Judge, in passing sentence, thought it right to say that if it had not been for the appellant's age he would have felt it his duty in the circumstances to pass a very severe sentence. He said: "Your age is the only reason which prevents me from sending you to penal servitude." In those circumstances we do not think that there is any occasion to reconsider this sentence.

As regards both conviction and sentence the appeal is dismissed.

The prisoner appealed under a certificate given by the Attorney-General to the House of Lords.

Paley Scott, K.C. (*W. A. Macfarlane* with him), for the appellant:

The substantial question raised in this appeal is whether, where a prisoner's character has been put in issue, he can be cross-examined regarding a previous charge of which he has been acquitted. The complaint on behalf of the appellant relates to the questions which were put to the prisoner at the opening of his cross-examination: "*Q.* This is the second time that sudden death has come to a woman patient of yours, is it not? *A.* Yes. *Q.* The first time was in 1927? *A.* In 1927, yes. *Q.* And you were tried for murder, were you not? *A.* No. *Q.* You were committed to trial for murder? *A.* No. *Q.* And were you tried for manslaughter? *A.* Something like that; I could not tell you exactly. *Q.* And you were acquitted by the jury? *A.* Yes." It is conceded that the appellant here had put his character in issue and become, like any ordinary witness, liable to be cross-examined as to credit, but it is submitted that the questions asked were inadmissible and that the only object of them was to suggest that the appellant had been guilty of the same crime before. The Court of Criminal Appeal held that section 1 (f) of the Criminal

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Evidence Act, 1898, expressly permits this kind of cross-examination. Questions of this kind could not have been put to any other witness for the purpose of discrediting him; such questions are not relevant to the issue of character, for it is nothing against a man's character that he has been previously charged and acquitted. In certain very limited circumstances a previous charge might be relevant. For example, when a man under twenty-four years of age is charged with carnal knowledge of a girl under sixteen, he loses the benefit of the defence of "reasonable cause to believe" if he has been previously charged with such an offence and he could, therefore, be properly asked whether he had been previously so charged. Again, if a man were charged with rape and were to say in his evidence-in-chief: "I have for many years lived happily with my wife and do not pursue other women," he could be asked, if such were the case, whether he had not on a previous charge of rape relied on the defence of consent and whether his acquittal had not been based on that ground. But if questions as to a previous charge are ever to be admissible, there must be some further ground which makes the matter relevant. The whole structure of section 1 (f) of the Act of 1898 is intended to protect a prisoner who gives evidence against something to which he would otherwise be exposed, and the word "charged" may have been inserted in the prohibition clause *ex abundanti cautela*, because it was recognised that to say that a man has been charged prejudices him in the eyes of his fellow-men. It is wrong to read the portion of the sub-section which follows upon the word "unless" as permitting any one of the three lines of cross-examination forbidden by the introductory words. The Act does not extend the right of cross-examination beyond that which would have been permissible if no protection had been given thereby to a prisoner giving evidence on his own behalf. [He referred to BARRON (1913), 9 Cr. App. R. 236;

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GREEN (1908), 1 Cr. App. R. 124; SULLIVAN (1913), 9 Cr. App. R. 201; Archbold's Criminal Pleading, etc., 28th edn., p. 482; Article "Cross-examination of the Prisoner," 33 L. J. Newsp. 563.] In a civil action between different parties, the parties may not be bound by a finding that a man is or is not guilty on a criminal charge (McHUGH (1831), Jebb's Cr. Cas. 120; SMITH (1783), 1 Leach 288; *Re* CRIPPEN (1911), P. 108), but a conviction or acquittal operates as an estoppel between the Crown and an accused person.

If the questions asked were inadmissible, the case is clearly not one in which the House ought to apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907. In THOMPSON (13 Cr. App. R. 61; (1918) A. C. 221) it was stated on behalf of the Crown that this House could act on the proviso, and it is not disputed that the House has power to do so in a proper case. But where evidence has been improperly admitted the test to be applied is whether the jury may have been influenced by that evidence: FISHER (3 Cr. App. R. 176; (1910) 1 K. B. 149). In a recent case, MORRISSEY (1932) 23 Cr. App. R. 188, it was held that the mischief caused by improper cross-examination as to a prisoner's character was incalculable and could not be rectified in the summing-up. [He referred also to ELLIS (5 Cr. App. R. 41; (1910) 2 K. B. 746) on this point.]

J. Willoughby Jardine, K.C. (*Alan Bell* with him), for the Crown:

In putting the questions complained of to the prisoner in cross-examination reliance was placed on Archbold's Criminal Pleading, 28th ed., p. 482, and a case tried by Day, J., at Swansea Summer Assizes, 1898, there referred to. The questions would not have been asked unless the prisoner had set up his character, but it should be remembered that counsel for the prisoner had quite gratuitously raised this collateral matter at an earlier stage in the proceedings and left the inquiry in an uncertain

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state. The matter, however, does not depend only on the general law, but also on the construction of section 1 of the Criminal Evidence Act, 1898. That statute gives a particular type of witness a particular type of protection, and it is not surprising to find that, if he chooses to cast aside that shield, he may be subjected to a more extensive right of cross-examination. On the plain language of the sub-section, once a prisoner puts his character in issue, he renders himself liable to cross-examination on any previous charge. There is no distinction in principle between a pending charge and a charge which has resulted in an acquittal, because in each case the accused person is presumed to be innocent. The Court of Criminal Appeal rightly distinguished BARRON (*supra*) from the present case as not being *in pari materia*, because there the question was one of the admissibility of affirmative evidence-in-chief and the construction of the Act of 1898 did not arise. [He then summarised the case for the Crown and invited the House, in view of the evidence, to apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907, on the ground that the jury must inevitably have convicted, even if the questions complained of had not been asked.]

THE LORD CHANCELLOR: The order of the House is that the order of the Court of Criminal Appeal be reversed and that the prisoner be released. We will put our reasons into writing at a later date.

The House took time for consideration.

June 28.—THE LORD CHANCELLOR (*b*):

My Lords,—The appellant, William Maxwell, was convicted at Leeds Assizes of the manslaughter of a woman called May Holliday, and also of using on her an instrument

(*b*) This speech is printed verbatim from a transcript of a shorthand note supplied by the courtesy of the official shorthand writers to the House of Lords.

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with intent to procure miscarriage. In effect he was found guilty of causing the woman's death by performing on her an illegal operation. He was sentenced to twenty months' imprisonment with hard labour. He appealed from that conviction to the Court of Criminal Appeal, who dismissed the appeal. From their decision he has now appealed to your Lordships' House under a certificate given by the Attorney-General under the Criminal Appeal Act, 1907, on the ground that there is involved a point of exceptional public importance so that in his opinion it was desirable in the public interest that a further appeal should be brought. The question is whether it was permissible in the particular facts of the case, under the Criminal Evidence Act, 1898, s. 1, proviso (f), for the prosecution to ask the prisoner whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal. [The Lord Chancellor read section 1 (f) of the Criminal Evidence Act, 1898.]

The particular facts under which the question here arises are as follows. At the trial a detective-inspector in the Hull city police force gave evidence that upon November 17 previously he went to 11 Sandringham Street, the address of the prisoner, and met him in the passage of his house, and that the prisoner said to him, "Now, Mr. Huxley, I am unlucky again." When Mr. Paley Scott proceeded to the cross-examination of this witness, he said to him, "There is one thing in your evidence that I think it is necessary to ask you something about. His words to you began, 'Now, Mr. Huxley.'" The cross-examination then continued as follows:—

"*Q.* I take it he knew you therefore?—*A.* Yes.

"*Q.* 'I am unlucky again.' Is it a fact within your knowledge that a patient of his whom he was treating some seven years ago died during the treatment?—*A.* Yes.

"*Q.* Not at his house, I think?—*A.* No.

"*Q.* But at a time when the patient was undergoing

treatment by him?—*A.* En route to his house from her home address.

"*Q.* So far as you know, would that be what he was referring to when he said, 'I am unlucky again'?—*A.* I should imagine so.

"Mr. Willoughby Jardine: My Lord, I venture to submit that as my learned friend has asked about a patient who died some years ago and has left it at that, I am entitled to ask a further question on that topic.

"Mr. Justice Du Parcq: Is there any doubt about that, Mr. Paley Scott? The jury are entitled to know the whole story.

"Mr. Paley Scott: I can only say at the moment that I do not know what the question is going to be. I know what the facts are.

"Mr. Willoughby Jardine: What are the facts which followed the death?

"Mr. Justice Du Parcq: I do not know about the facts which followed the death; I do not know anything about it.

"Mr. Willoughby Jardine: The question that I propose to ask is: What happened to William Maxwell consequent upon the death of his patient?

"Mr. Justice Du Parcq: I do not think I could allow that question in that form.

Mr. Willoughby Jardine: If your Lordship pleases.

"Mr. Paley Scott: Now that that has been asked there may be a misunderstanding. The jury may think that he was convicted of some offence as a result of that. As long as it is quite understood that that did not happen, I have no objection. That question would suggest to the minds of the jury that he had been convicted.

"Mr. Justice Du Parcq: You found that a patient of his died during some treatment that she was receiving from him?—*A.* Consequent upon treatment, my Lord."

Subsequently the prisoner went into the box himself. He was asked by his learned counsel, "Have you ever been

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convicted of any offence in your life?" and he replied, "No, I have lived a good, clean, moral life, sir."

Thereupon, when the counsel for the Crown proceeded to cross-examine the witness, he asked him the following questions:—

"*Q.* This is the second time that sudden death has come to a woman patient of yours, is it not?—*A.* Yes.

"*Q.* The first time was in 1927?—*A.* In 1927, yes.

"*Q.* And you were tried for murder, were you not?—*A.* No.

"*Q.* Were you committed to trial for murder?—*A.* No.

"*Q.* And were you tried for manslaughter?—*A.* Something like that: I could not tell you exactly.

"*Q.* And you were acquitted by the jury?—*A.* Yes.

"*Q.* That woman was put by an adopted daughter of yours into a taxi and died before she got home?—*A.* No.

"*Q.* Where did she die?—*A.* At home.

"*Q.* How long after leaving your house?—*A.* I could not tell you because I had nothing whatever to do with it. She got nothing from me and I stopped the case a week before. They had only been twice or thrice at my place.

"*Q.* That matter was enquired into at the assizes at Leeds and you were acquitted by a jury?—*A.* Yes, and I have given the information to the detectives and police of Hull, and people came and told me the whole story of that girl and what the mother had done. The next day after her death young doctors from the infirmary gave evidence that the uterus was in a very advanced state of decomposition, a thing we have never seen before. I never used anything and never had. That was nothing to do with me whatever. She had never got into my room; she was here at the door."

The learned Judge in summing up referred to the incident of the prisoner's acquittal on the previous charge in the following words:—

"Then there is one other matter which I must deal with.

It came out in the course of the case that the prisoner had talked about another unfortunate business, or words to that effect; I am not giving the exact words. He had said something like, 'I'm unlucky again,' and naturally enough Mr. Paley Scott, representing him, wanted it to be clear to you that that did not mean that he had ever previously been convicted of any offence. Naturally enough also, Mr. Jardine, appearing for the prosecution, thought that you ought to know a little more about what happened, and it turns out that a patient of his died in circumstances which apparently gave rise to suspicion, as a result of which he was put on his trial for murder and acquitted. Now my advice to you is, and I am sure you will act upon it: Put that out of your minds altogether. You and I know very little about it; I know no more than you do, and that is not much. All we know about it is that he was suspected, and suspicion in these Courts, I hope, counts for nothing; it counts for nothing with me and I am sure it will count for nothing with you. He was tried and he was acquitted and that means that he can say that he was not proved guilty, and if he was not proved guilty he ought to be assumed innocent on that charge. Therefore, you are left at the end of all that evidence very much where you were before, and I am sure you will be wise enough to say to yourselves: 'We will deal with this case and the evidence in this case and nothing else.'"

In the Court of Criminal Appeal the argument proceeded mainly upon the construction of the section above referred to and its bearing on the facts which came out at the trial, and in dismissing the appeal the learned Lord Chief Justice said:—

"Now, here it is manifest that the appellant had personally and by his advocate asked questions with a view to establishing his good character and had given evidence of his good character and, therefore, the only question which we have to consider is whether that which was done here

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on the part of the prosecution was permitted under the words of paragraph (f). It is obvious that that paragraph distinguishes three things: (1) has committed, (2) been convicted of, and (3) been charged with any offence other than that wherewith he is charged. The questions which were here asked were questions on the point whether the appellant had been previously charged with some offence other than that wherewith he was then charged. The argument of Mr. Paley Scott is that the mere fact that a charge had been made against the appellant, seeing that that charge terminated in an acquittal, ought not to have been made the subject of cross-examination for the reason that it left a doubt whether the acquittal was justified. If that argument is correct, it would seem that in no circumstances can room be found for the words 'or been charged with' as distinguished from the words 'committed' or 'been convicted of.' It seems indeed a bold argument to allege that it was more prejudicial to the appellant to be asked whether he had been charged and acquitted than to be asked *simpliciter* whether he had been charged. No doubt, as Mr. Paley Scott has said, if counsel for the prosecution had merely asked whether the appellant had been charged with the other offence, it would have been the duty of counsel for the defence to make it clear in re-examination that that charge had terminated in an acquittal."

On the appeal to your Lordships' House, your Lordships came to the conclusion, after hearing the argument on both sides, that the appeal should be allowed, and made an order accordingly, but announced that at a later date the reasons for that course would be given. This I now proceed to do.

It must first of all be stated that it has been admitted throughout that the prisoner, in saying that he had lived a good, clean, moral life, had put his character in issue, and had in the words of the proviso (f) (ii) "given evidence of his good character." The first question here is, what consequences follow from that?

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This involves the proper construction of section 1 (f) of that Act. We start with the hypothesis that the prisoner had given evidence of his good character. It will be remembered that it was not until the year 1854 that the parties to a civil case were entitled to give evidence on their own behalf. But the prisoner could not give evidence on his own behalf at his trial until the coming into operation of the Criminal Evidence Act, 1898, except in a few cases, of which the most important are those specified in certain sections of the Offences against the Person Act, 1861, the Law of Evidence Act, 1877, and the Criminal Law Amendment Act, 1885. When Parliament by the Act of 1898 effected a change in the general law and made the prisoner in every case a competent witness, it was in an evident difficulty and it pursued the familiar English system of a compromise. It was clear that if you allowed a prisoner to go into the witness box it was impossible to allow him to be treated as an ordinary witness. Had that been permitted, a prisoner who went into the box to give evidence on oath could have been asked about any previous conviction, with the result that an old offender would seldom, if ever, have been acquitted. This would have offended against one of the most deeply rooted and jealously guarded principles of our criminal law, which, as stated in MAKIN *v.* ATTORNEY-GENERAL FOR NEW SOUTH WALES (1894, A. C. 57, at p. 65), is that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried." Some middle way, therefore, had to be discovered, and the result was that a certain amount of protection was accorded to a prisoner who gave evidence on his own behalf. As it has been expressed, he was presented with a shield, and it was provided that he was

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not to be asked and that, if he was asked, he should not be required to answer, any question tending to show that he had committed or been convicted of or been charged with any offence other than that wherewith he was then charged, or was of bad character. Apart, however, from this protection, he was placed in the position of an ordinary witness in an ordinary civil case. The laws of evidence were not otherwise altered by the Criminal Evidence Act, 1898, and the prisoner who was a witness in his own case could not be asked questions which were irrelevant or had nothing to do with the issue which the Court was endeavouring to decide. As has already been pointed out, the prisoner in the present case threw away his shield and, therefore, the learned counsel for the prosecution was entitled to ask him, and he could be required to answer, any question tending to show that he had committed or been convicted of or been charged with an offence, but subject to the consideration that the question asked him must be one which was relevant and admissible to the case of an ordinary witness. The Act does not in terms say that in any case a prisoner may be asked or required to answer questions falling within proviso (f), or impose any such affirmative or absolute burden upon him.

I think this conclusion is confirmed by a study of the words of the statute. In section 1, proviso (e) it has been enacted that a witness may be cross-examined in respect of the offence charged, and cannot refuse to answer questions directly relevant to the offence on the ground that they tend to incriminate him: thus if he denies the offence, he may be cross-examined to refute that denial. These are matters directly relevant to the charge on which he is being tried. Proviso (f), however, is dealing with matters outside, and not directly relevant to, the particular offence charged; such matters, to be admissible at all, must in general fall under two main classes; one is the class of evidence which goes to show, not that the prisoner did the

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acts charged, but that, if he did those acts, he did them as part of a system or intentionally, so as to refute a defence that, if he did them, he did them innocently or inadvertently; as for instance in MAKIN *v.* ATTORNEY-GENERAL FOR NEW SOUTH WALES (*supra*), where the charge was one of murder. Another illustration of such cases is BOND ((1906) 2 K. B. 389). This rule applies to cases where guilty knowledge or design or intention is of the essence of the offence. The other main class is where it is sought to show that the prisoner is not a person to be believed on his oath, which is generally attempted by what is called cross-examination to credit. Closely allied with this latter type of question is the rule that, if the prisoner by himself or his witnesses seeks to give evidence of his own good character, for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character, so that he may fairly be cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined to show the contrary. All these matters are dealt with in proviso (f). The substantive part of that proviso is negative in form and, as such, is universal and is absolute, unless the exceptions come into play. Then come the three exceptions; but it does not follow that, when the absolute prohibition is superseded by a permission, the permission is as absolute as the prohibition. When it is sought to justify a question, it must not only be brought within the terms of the permission, but also must be capable of justification according to the general rules of evidence and, in particular, must satisfy the test of relevance. Exception (i) deals with the former of the two main classes of evidence referred to above, that is, evidence falling within the rule that, where issues of intention or design are involved in the charge or defence, the prisoner may be asked questions relevant to these matters, even though he has himself raised no question of his good character. Exceptions (ii) and (iii)

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come into play when the prisoner by himself or his witnesses has put his character in issue, or has attacked the character of others. Dealing with exceptions (i) and (ii), it is clear that the test of relevance is wider in (ii) than in (i); in the latter, proof that the prisoner has committed or been convicted of some other offence can only be admitted if it goes to show that he was guilty of the offence charged. In the former (exception (ii)), the questions permissible must be relevant to the issue of his own good character and, if not so relevant, cannot be admissible. But it seems clear that the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune. It seemed to be contended on behalf of the respondent that a charge was *per se* such evidence that the man charged, even though acquitted, must thereafter remain under a cloud, however innocent. I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue, namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined.

It does not result from this conclusion that the word "charged" in proviso (f) is otiose: it is clearly not so as

regards the prohibition, and, when the exceptions come into play, there may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge, or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of the trial on a charge which failed, which tend to throw doubt on the evidence which he is actually giving, though this last class of case must be rare and permissible only with great safeguards.

Again, a man charged with an offence against the person may perhaps be asked whether he had uttered threats against the person attacked because he was angry with him for bringing a charge which turned out to be unfounded. Other probabilities may be imagined. Thus, if a prisoner has been acquitted on the plea of *autrefois convict* such an acquittal might be relevant to his credit, though it would seem that what was in truth relevant to his credit was the previous conviction and not the fact that he was erroneously again charged with the same offence; again, it may be, though it is perhaps a remote supposition, that an acquittal of a prisoner charged with rape on the plea of consent may possibly be relevant to a prisoner's credit.

But these instances all involve the crucial test of relevance. And in general no question as to whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the Judge, who has a discretion under proviso (f), unless it helps to elucidate the particular issue which the jury is investigating, or goes to credibility, that is, tends to show that he is not to be believed on his oath; indeed the question whether a man has been convicted, charged or acquitted, even if it goes to credibility, ought not to be admitted, if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence with which he is charged. I think that it is impossible in the present case to say that the fact that the

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prisoner has been acquitted on a previous charge of murder or manslaughter was relevant, or that it tended in the present case to destroy his credibility as a witness.

An instance showing how jealously our law regards the rights of prisoners giving evidence may be found in the recent Criminal Law Amendment Act, 1922. Section 2 of that Act provides that, in the case of a man of twenty-three years of age or under, the presence of reasonable cause to believe that the girl in respect of whom the offence is alleged was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under that section. If he is acquitted on that charge and is subsequently charged with another offence under the section and gives evidence on his behalf, he may then be asked whether he has been previously acquitted on a charge under the section. It must not be forgotten that the facts of the present case are very peculiar and exceptional, and it is unnecessary to review or restate the whole law of evidence in criminal matters.

I now turn to the second point, namely, the contention advanced by counsel for the prosecution that, apart from the Criminal Evidence Act, learned counsel for the prisoner by his cross-examination of the inspector had let in the evidence of a previous charge.

I do not think that it is possible to maintain such a contention. The learned counsel for the prosecution's chief argument was that, as his opponent had asked the question, he was entitled to get out the whole story. The answer to this is the answer already given, that, as the charge had resulted in an acquittal, the circumstances of the case were irrelevant to the issue which the jury was trying. In fact, the acquittal rendered the charge a nullity. The learned counsel for the prosecution was forced to admit that, if his contention was right, it was impossible for a man ever to clear his character by an acquittal, because the fact that a *prima facie* charge had been made against him was always

a slur upon his character. He even went so far as to say that when a man was charged before a magistrate, even if the prosecutor immediately admitted that he had made a mistake and that the person whom he charged was not the man, the fact that he had been charged with an offence must be a slur upon him. Such a contention is contrary to the whole idea of English jurisprudence.

It was further argued by the prosecution that, even if the evidence was wrongly admitted, the prisoner was not entitled to have the verdict and sentence set aside by reason of the proviso to section 4 of the Criminal Appeal Act, 1907, which says that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. Probably upon no other section of the Act have so many cases been decided as upon this one. Their name is legion. The rule which has been established is that, if the conviction is to be quashed on the ground of misreception of evidence, the proviso cannot operate unless the evidence objected to is of such a nature and the circumstances of the case are such that the Court must be satisfied that the jury must have returned the same verdict even if the evidence had not been given. We think that the appellant has brought himself within this rule. Suppose, for example, that a man had been acquitted three times and the question put to him had been, "Is it a fact that you have been charged three times with this offence, and, secondly, is it a fact that on each occasion you have been acquitted?" The effect of such a statement on the minds of a jury might be overwhelming, and it is impossible to say in this case that the reception of this evidence was not the deciding factor which made the jury give their verdict. Here was a man of seventy-four years of age. It is impossible to deny that the evidence was strong against him. It is impossible to deny that he had to make very damaging

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admissions; but his case was that he had not in fact touched the deceased woman on this occasion, and that the seizure and collapse which immediately preceded her death took place when he in fact was in another room. It may well be that the fact that he had been charged some years before with a similar offence, although the charge led to an acquittal, may have been the last ounce which turned the scale against him.

If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the proviso to section 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

The other noble and learned Lords concurred.

Question put: That the Order appealed from be reversed.
The Contents have it.

The Court of Criminal Appeal, pursuant to the above decision, granted a motion on behalf of the appellant for an Order quashing the conviction.

Conviction quashed.

Solicitors for appellant: F. Wilberforce Bridge for Williamson & Stephenson, Hull.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE HUMPHREYS.

LESLIE MARTIN.
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Murder—Three Prisoners Charged—Only direct evidence against two that of Accomplice—Proper Warning as to Corroboration—Corroboration in fact slight—Direction that matter might be regarded as Corroboration which was not evidence against two prisoners—Two Convictions quashed.

M., A. and R. were jointly charged with murder. The only direct evidence against A. and R. was that of their accomplice M., and the Judge properly warned the jury that they should look for corroboration of his evidence. There were certain matters, which the Judge enumerated in his summing-up, capable of being regarded as corroboration, but the total effect of those matters taken together was slight. The Judge then referred to a further matter as amounting to possible corroboration of M.'s evidence, namely a conversation between M. and one of the Crown witnesses after the commission of the crime.

Held, as this matter was not even admissible evidence against A. and R.. in view of the circumstances of the case, the convictions of A. and R. must be quashed.

Appeals against conviction.

The appellants were all convicted at the Central Criminal Court on April 27, 1934, of the murder of Eliza Juliet Ray, and were sentenced by Macnaghten, J., to death.

The following is a sufficient summary of the facts, which appear more fully in the judgment:

Mrs. Ray was a woman of seventy-six years of age who had lived for many years at 47 Handcroft Road, Croydon. A lodger named Pennefather lived in the house, and was

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in the habit of going out every evening about 7.15 or 7.30 for approximately an hour's walk. There was a rumour current locally that Mrs. Ray kept a large sum of money in the house. On the evening of Saturday, February 17, 1934, Mr. Pennefather went out about his usual time and on his return found the house ransacked, and Mrs. Ray lying dead, with a handkerchief (subsequently identified as the appellant Martin's) stuffed into her mouth and another tied round her face. There was evidence that the three appellants had been together in the afternoon and evening of February 17. On April 16 Martin made a statement to a chief inspector of police, in which he said that a man named Knowles had proposed to him the robbery of the house, but that he [Martin] had replied that he was too well known in the district, and that accordingly he had persuaded Ansell and Ross to commit the robbery. He further said that he had not himself entered the house, but stood outside to find out what had happened, and that his handkerchief had been taken from him by the others against his will. He gave evidence to the same effect at the trial, and said that he expected a share of the proceeds and that he believed that Mrs. Ray could be overpowered without violence.

Laurence Vine, for the appellant Martin:

The case of Martin stood in no different position from that of Knowles, who was called as a witness by the Crown and who, as the Crown admitted, could not have been convicted of murder. The summing-up in general was careful and painstaking, but the Judge omitted to refer to the evidence of a Mr. and Mrs. Spencer which was materially in favour of the appellant. Further, the Judge should have directed the jury that, if the appellant Martin had no reason to contemplate that serious violence would be used towards Mrs. Ray, they might find him guilty of manslaughter only. The case is distinguished from BETTS

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and RIDLEY (1930), 22 Cr. App. R. 148 by the fact that the appellant Martin was not in a position to give assistance to those engaged in the robbery, nor did he take up his position outside the house with that intention. There was evidence that the others went further than Martin ever expected or intended, and definitely varied the arrangement which had been made.

W. B. Manley, for the appellants Ansell and Ross:

The Judge properly warned the jury that, in considering the case against these appellants, they must look for corroboration of Martin's evidence, inasmuch as he was an accomplice. He dealt with a number of matters as matters which the jury were entitled to regard as corroboration, but their total effect was small, and in some cases circumstances favourable to the appellants were omitted. The most serious ground of complaint, however, is that the Judge directed the jury that a conversation alleged to have taken place between Martin and Knowles after the commission of the crime, in the absence of Ansell and Ross, might be corroboration of Martin's evidence. Such a conversation was not evidence against Ansell and Ross at all, nor could the accomplice Martin corroborate his own statement.

G. D. Roberts, for the Crown:

It is of no avail to the appellant Martin to compare his position with that of Knowles, against whom no charge was preferred and no evidence offered. Even if the jury accepted Martin's own evidence, the fact that he kept watch outside a house while his confederates committed a felony involving violence which resulted in death would render him guilty of murder. [He referred to BETTS and RIDLEY, *supra*.] With regard to the case against Ansell and Ross, there was some corroboration of the accomplice Martin's evidence, and the Judge warned the jury to look for corroboration. It was unfortunate that the Judge referred to the conversation between Martin and Knowles as possible corroboration. The jury were, however,

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repeatedly told that Knowles was a discredited witness. The Court is invited in all the circumstances to apply the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907.

[THE LORD CHIEF JUSTICE: Has the proviso ever been applied in a capital case?] Only in LEE KUN (1915), 11 Cr. App. R. 293, where the circumstances were entirely different.

Laurence Vine replied.

THE LORD CHIEF JUSTICE: These appellants, Leslie Martin, Albert Henry Ansell and Walter Thomas Ross, were convicted at the Central Criminal Court of the murder of Eliza Juliet Ray on Saturday, February 17 of this year. They now appeal against conviction.

It is not necessary to repeat again the facts of the case which were so carefully examined at the trial, and recapitulated in the argument addressed to this Court yesterday. Mrs. Eliza Juliet Ray was a widow seventy-six years of age who lived at 47 Handcroft Road, Croydon. There lodged in the same house an Army pensioner, Mr. Pennefather, a man of seventy-three, and it was his habit to take a walk every evening about a quarter past seven or half past seven, and to return in about an hour. The evidence was that he had a practice of calling for a chat upon a man named Schulman who was a tailor, on his way up Derby Road from Handcroft Road to London Road, Croydon, and that road he reached at a point opposite West Croydon station. Mrs. Ray received rents of some £12 a month, and there was a story, which was without foundation, that she kept a considerable sum of money, some £3,000, in the house. That story appears to have passed from Schulman to a man named Knowles, who in his turn passed it on to the appellant Leslie Martin whom he knew as Jones, and that

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information was given to Martin, according to the evidence, at a public-house in Croydon on Wednesday, February 14, and Knowles took Martin past the tailor's house and past Mrs. Ray's house. They passed the house again, and there was some talk of getting into the house by means of a ladder. On the following day, after communication from Martin, Ross and Ansell came to Croydon and saw Martin, and later that evening Martin tried to identify the lodger, Pennefather; they succeeded in identifying him the following evening. Then on Saturday, February 17, at about two o'clock in the afternoon, according to the evidence, Ansell and Ross came to Croydon, and at a quarter past six or thereabouts Martin, who was with a man not identified, told Knowles: "We're going to do that show to-night." With regard to Knowles it is right to say that there was a clear warning as to the nature of his evidence, and there was also a clear warning as to the nature of Martin's evidence, and it goes without saying that the case for the Crown was presented with the most perfect fairness by Mr. Roberts, as he argued for the Crown with most perfect fairness to the accused yesterday.

Now on that evening the Army pensioner, Mr. Pennefather, went out as usual at about twenty-five minutes past seven, leaving Mrs. Ray in good health, and he walked up Derby Road to the North End for an hour, and there was evidence that the other two appellants, Ansell and Ross, were with the appellant Martin, not only during the afternoon of that day, but also in the evening between seven o'clock and eight o'clock at the "Derby Arms" public-house, situate about 137 yards from Mrs. Ray's house. There was some discussion as to the times at which they left, but it was said that Ansell and Ross caught an omnibus to West Croydon about ten minutes past eight to a quarter past eight, being seen off on their journey by Martin. At about half past eight Mr. Pennefather returned and let himself in, and he found that the mat was dis-

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arranged, the sitting-room door was bolted on the outside, and Mrs. Ray was lying in the sitting-room; she was gagged, one handkerchief being stuffed like a ball into her mouth, and another handkerchief tied over it. She was dead. There had evidently been a struggle in the passage, the place had been ransacked, and a jemmy had been used upon a writing desk. The premises had not been broken into. Mrs. Ray's purse was on the dining table, and contained 2½d. The only drawer that had money in it had been overlooked. That was the drawer which contained some £14. The handkerchief that was inside Mrs. Ray's mouth belonged to the appellant Martin. When he came to give evidence, as he did at the trial, he admitted that that was his handkerchief. After seeing the other appellants off by the omnibus, Martin, according to the evidence, went to Knowles's stall in Croydon and said: "We have turned that rat over, and we never found anything, not a light. If anybody asks you any questions say you know nothing about it as no one saw us go in and no one saw us come out. All I left behind me was a handkerchief." Knowles said: "You never hurt that old lady, did you?" to which Martin replied, "No, we pushed her in the kitchen." About half past nine that night Martin came to Knowles, according to the evidence, and told him that the ambulance was "down there," and afterwards Martin went up to the Alexandra Club and saw the other two appellants; and on the following day, that is to say Sunday, Knowles, conscious as he was of the part he had taken in the matter, gave information to the police, and meeting Martin about seven o'clock in the evening gave him some money to go to London, as Knowles said, to tell the others. On the following day, the Monday, February 19, Martin was seen; he was told that he would be questioned about the murder, and on the way to the station he said: "I will tip you this; they will do all the talking; I will sit back and listen." He was asked to give an

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account of his movements, and he asked for legal advice. He was charged some hours later; he apparently wished to make a statement, but he simply said: "I am perfectly innocent"; but afterwards when it was apparent that Knowles had given information, and that Ansell and Ross had made statements, the appellant, Martin, on April 16, after advice, handed a written statement, which at the trial became Exhibit No. 16, to Chief Inspector Wesley. That statement was handed to the Inspector in the presence of Martin's solicitor, and in that statement, which has been referred to again and again, Martin said that Knowles had proposed the robbery, and had said that Mrs. Ray was very old and could easily be managed; he said that he himself, Martin, was afraid of being recognised, and so fetched the other two appellants. He said he would have supplied rags to tie up Mrs. Ray, but he could not get any, and Ansell took his handkerchief. He denied that he ever went to 47 Handcroft Road, Mrs. Ray's house, but said he stayed in Derby Road waiting to find out what had happened.

Now at the trial Martin gave evidence, and said that the statement which he had made on April 16 was true. When he was cross-examined he said that he did not intend to take part in what was done, he did expect to share in the proceeds, and he thought that Mrs. Ray could be managed without violence. He admitted that he intended to provide the rags, and he admitted that it was his handkerchief that was stuffed down Mrs. Ray's throat. He said he waited where he could see the gate. He denied that he had said to Knowles: "We have turned the rat over," and so forth.

Now to deal first with the case of Martin. The uncontradicted and unchallenged evidence of Sir Bernard Spilsbury was that the cause of Mrs. Ray's death was shock, due to partial asphyxiation as the result of external pressure. Sir Bernard Spilsbury described the injuries

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which she had received; he said that a considerable amount of violence had been used; he said that there were several blows, and he indicated to the jury the position of the various bruises which he had found. Upon that uncontradicted evidence it was perfectly obvious to the jury that murder had been committed, and the question was, by whom? Now it is complained on behalf of the appellant, Martin, first of all, that he was in no worse position than the position of Knowles, but, with all due respect to Mr. Vine's argument, that contention ignores the circumstance that, although the information came from Knowles, it was, by Martin's own admission, he who arranged what should be done; he was present, not, he says, in the house but in the neighbourhood, and upon his statement there was ample material upon which the jury could find either that his were the hands which had inflicted the violence on Mrs. Ray and taken the measures that were thought necessary to prevent her screams from being heard, or alternatively it was clearly open to the jury to find that Martin was present aiding and abetting. The law was expounded to the jury quite fairly, indeed, it might be said somewhat too favourably to the appellant Martin—the law, that is to say, as it was re-stated in the well-known case of BETTS and RIDLEY in (1930) 22 Cr. App. R. at page 154 and the following pages. It is argued that the jury ought to have been directed that they might find a verdict of manslaughter as against Martin, but in the opinion of the Court any such direction upon the facts of this case would have been a misdirection. There was no room here for a verdict of manslaughter. Finally, it is said that the learned Judge in his summing-up omitted to pay attention to the evidence of two witnesses, Mr. and Mrs. Spencer, who at seven and a half minutes past eight on the night of February 17, 1934, saw, as they said, Martin at a particular point in Handcroft Road, but, as was observed, and truly observed, by Mr. Roberts, that evidence was quite consistent with the

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presence of Martin in that place after this crime had been committed.

In our opinion there is no ground at all so far as the appellant Martin is concerned to interfere with this conviction and his appeal is accordingly dismissed.

Martin had better leave the dock.

[Martin left the dock.]

Now with regard to the two appellants, Ansell and Ross, the case, as Mr. Roberts said yesterday, stands upon quite a different footing. So far as they were concerned, the only direct evidence against them was the evidence of Martin, who, if the case for the Crown were regarded as made out, was in the position of an accomplice; it was, therefore, of the utmost importance to see whether there was corroboration of Martin's story, so far as these two appellants were concerned, and it was of the utmost importance that evidence which was not corroboration should not be treated as if it were corroboration.

Now, that there was some corroboration was not to be denied. Mr. Roberts enumerated the various matters of fact, of inference and of probability, in his argument yesterday. If all those matters were put together and the question were asked what did they amount to, the answer might possibly be, they amount to a case of suspicion, it may be of strong suspicion; but in the opinion of the Court it could not be said that those matters taken together amounted to any strong corroboration. It was, therefore, even more than usually important that nothing should be treated as corroboration which did not truly fall within that category. Here, by a momentary slip, in what was otherwise a most admirable and careful summing-up, it does appear that the learned Judge treated as corroboration matter which not only was not corroboration, but, so far as these two appellants are concerned, was not admissible as evidence against them. It may be well to refer to two passages in the summing-up. First of all, at page 20,

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referring to the evening of Sunday, February 18, the learned Judge said this: "The evidence of Knowles does not implicate either Ansell or Ross, nothing that he says implicates them, except the statement that he admits or asserts that Martin spoke of 'we' as having turned the rat over, and when on the Sunday Martin learnt from Knowles that Knowles had made a statement to the police as to what he (Knowles) knew about the matter, and that he would be arrested, he said 'Give me some money to go to London to tell the others.'" Now it is true that in that part of the summing-up the learned Judge is dealing with the case as against the appellant Martin. The next paragraph of the summing-up begins with the words: "I now conclude my observations with regard to Martin," but undoubtedly in that passage an exception there seems to be made to the statement that the evidence of Knowles does not implicate either Ansell or Ross, and that exception is a statement which Knowles has made concerning another statement made by Martin to him. Again, when the learned Judge came to deal with the case against these two appellants Ansell and Ross, prefacing this part of his summing-up at page 22 with the words: "I now pass from the case of Martin and come to the case of the other two men, whose defence is: 'We know nothing about the matter, never heard of Mrs. Ray, never were in Handcroft Road,'" the learned Judge goes on to say by what can only be regarded as a momentary slip—his mind may well have been directed, as was said yesterday, to something else—but he does say, at page 33: "Now there is no doubt that when they met together on that Sunday night"—that is to say, Martin and the elder Knowles and the younger Knowles—"when they met together on the Sunday night"—that is to say, the day following the day of this crime—"there seems to be no doubt, because all three of them practically agree, that Knowles did what young Knowles described as 'roused' Martin, I understood that to mean abused him;

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I forget whether he actually used the words 'murdering bastard,' but that he roused him and spoke in loud terms; that he was told not to speak so loud, that it would attract attention. Now there is no doubt about that, there is no question that he asked for money"—that is, that Martin asked for money—"and that Knowles gave him on that occasion two sixpences—he had given him two shillings on the night previous when they had met after the murder had taken place—and according to Knowles he gave him that money to go to London because he knew that Knowles had made his statement to the police, and he anticipated on that statement that he, Martin, would be arrested, and that he went up to London for the purpose as Knowles said—although that particular sentence is not confirmed by young Knowles because young Knowles was walking on in front, if you remember, with Hibbert—he gave him money in order to come up to London for the purpose, as old Knowles says, to tell the others." Now immediately after those words the learned Judge went on to say: "Now those I think are the whole of the facts on which the Crown rely as corroborating the statement made by Martin that these two men went into Mrs. Ray's house." What the effect of that slip may have been upon the minds of the jury it is not possible for this Court to conjecture, but if the jury believed, as they may well have believed, that this statement was evidence against Ansell and Ross, it would not be easy to imagine a piece of evidence more damaging to them; for what could be the purpose of Martin, in the events which had then happened, in going up to London to tell the others? Could there be any purpose at all, unless the others were involved in the crime, and is it not, to say the least, more than possible that the jury, having regard to the rest of the evidence, believed that "the others" meant Ansell and Ross? That this was a momentary slip is quite obvious. It is also quite obvious that at the Central Criminal Court the words seem to have escaped attention.

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It may well be that when the learned Judge is addressing the jury it is not quite easy for learned counsel to catch every word that passes, or this sentence might have been the subject of immediate remark; but we have to deal with the case as it is presented, and in view first of the nature of the corroboration relied upon here, and, secondly, of this passage in the summing-up which appears at any rate to treat as evidence against Ansell and Ross that which was not admissible as evidence against them, and to treat it as corroboration notwithstanding that, if the words had been used, they would have been words coming, according to the case for the Crown, from an accomplice, we have come to the conclusion that there is no alternative for us but to say that so far as Ansell and Ross are concerned these appeals must be allowed and the convictions quashed.

Convictions of two appellants quashed.

[This judgment is a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE MACNAGHTEN.

JOHN WHELAN.

1934.
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Habitual Criminal—Statutory notice—Three previous convictions—Offence in one case wrongly described—Prisoner not misled—Notice not invalidated—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 4 (*a*).

In the statutory notice served under section 10, subsection 4 of the Prevention of Crime Act, 1908, on a prisoner who was to be charged as a habitual criminal, in the case of one of the three previous convictions on which it was intended to found the charge the offence was described as "attempted shopbreaking and being in possession of housebreaking implements," whereas in fact the prisoner had been convicted of attempted shopbreaking and being found by night armed with an offensive weapon with intent to break and enter a shop. The date of the conviction, the Court of trial, and the sentence were correctly set out.

Held, the prisoner had not been misled by the wrong description of the offence, and the notice was not thereby invalidated.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

The appellant was convicted on April 12, 1934, at Brad-

(*a*) Prevention of Crime Act, 1908, s. 10, sub-s. 4: ". . . . a charge of being a habitual criminal shall not be inserted in an indictment . . . (b) unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge; and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

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ford City Quarter Sessions of housebreaking and larceny, and on April 13 of being a habitual criminal. He was sentenced by the Recorder to three years' penal servitude and five years' preventive detention.

The notice served on the appellant under section 10, sub-section 4 of the Prevention of Crime Act, 1908, gave particulars of one of the three statutory convictions as follows: "Date: 6.3.1929. Court where convicted: Leeds Assizes. Offence: Attempted shopbreaking and being in possession of housebreaking implements (one other case taken into consideration). Sentence: 20 months' imprisonment." At the trial a conviction was proved on the date, at the Court, and resulting in the sentence as alleged, but it was proved that the second offence in respect of which the conviction had taken place was that of being found by night armed with an offensive weapon with intent to break and enter a shop, contrary to section 28, sub-section 1 of the Larceny Act, 1916, and not that of being found by night in possession of housebreaking implements, contrary to sub-section 2 of that section.

D. H. Robson, for the appellant:

In the particulars of one of the three statutory convictions to be relied on as the foundation of the charge the offence was wrongly described. It is important that the notice of the three previous convictions should be a proper notice of the very offences of which the offender has been convicted. Further, the appellant had worked honestly for nine months before the commission of the substantive offence, and the jury were misdirected as to the effect of this period of honest work.

G. W. Wrangham, for the Crown:

The fact that a person alleged to be a habitual criminal has done a period of honest work is not conclusive in his favour. [He referred to LAVENDER (1927), 20 Cr. App. R. 10 and WHITE and SHELTON (1927), 20 Cr. App. R. 61.]

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MACNAGHTEN, J.: [after reciting the provisions of section 10, sub-section 4 of the Prevention of Crime Act, 1908.] In this case the notice to the prisoner gave notice of the three previous convictions on which the prosecution was founded. Objection is taken that with regard to one of those convictions the notice was bad. The notice specified that he had been convicted of "attempted shopbreaking and being in possession of housebreaking implements" (one other case taken into consideration), and the offence of which he had in fact been convicted was that of attempted shopbreaking and being found by night armed with an offensive weapon with intent to break and enter a shop, contrary to section 28, sub-section 1 of the Larceny Act, 1916. In the opinion of the Court the notice did sufficiently specify the conviction in question. There is no ground for saying that the prisoner was in any way misled as to what the conviction was which was going to be relied upon as a ground of the charge.

[His Lordship then proceeded to deal with the second point raised by the appellant, and said that, in the opinion of the Court, the appellant ought to be given the benefit of the fact that he had worked honestly for nine months prior to the commission of the substantive offence and that the sentence of preventive detention ought to be quashed.]

Convictions affirmed.
One sentence quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE DU PARCQ.

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WILLIAM LITTLEBOY.

Summing-up—Defence of Alibi—Comment on Non-Disclosure prior to Trial—Within what limits proper.

There is no general proposition of law that in no circumstances may a Judge comment in his summing-up upon the failure of the prisoner to disclose his defence in the police court or prior to trial. Such comments should be made with care and with fairness to the prisoner, but, where the defence of *alibi* is for the first time raised at the trial, it may be proper for the Judge to observe that the failure to disclose that defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence.

NAYLOR (23 Cr. App. R. 177; (1933) 1 K. B. 685) explained and distinguished on the ground that the comments in the summing-up which were there held to be objectionable suggested that the silence of the prisoner when before the magistrates might be regarded as evidence against him or as corroborating the evidence of an accomplice.

Appeal against conviction.

The appellant was convicted at Norfolk Assizes on May 31, 1934, of carnal knowledge of a girl above the age of thirteen and under the age of sixteen years, and was sentenced by Avory, J., to twelve months' imprisonment in the second division.

The following is a sufficient summary of the facts and is, in substance, taken from the judgment:

The appellant was a man fifty-nine years of age and the uncle of Ruby Dorothy Ward, who on April 4, 1934, gave birth to a child. She stated that the appellant was the father and had had connection with her on three occasions,

twice in May, 1933, and also on June 29, 1933. So far as the offence alleged to have taken place in May was concerned, there was no corroboration of the girl's story, but with regard to the alleged offence of June 29 there was corroboration in the evidence of a girl named Molly Dugdale, who said that she had been in a motor-car with the appellant and Ruby Ward and that they had stopped at the appellant's house, and that Ruby Ward and the appellant had gone into the house for quarter of an hour. The appellant denied the alleged offences entirely and set up an *alibi* so far as June 29 was concerned. That defence was supported by the evidence of himself, his wife and two witnesses, who said that he was at Wroxham, which was some distance from his house in Norwich, at the time when, according to the case for the Crown, the offence was committed. A detective officer gave evidence that, when the appellant was spoken to about these offences, he said that he knew nothing about them and did not commit them, and that he did not remember bringing Ruby Ward or any other girls in his car to his house; that, when told he would probably be charged, he said: "Well, I do not know what to say to that"; and that when the summons relating to the charge had been read over to him, after being cautioned, he said: "Is this a summons for maintenance?" When formally charged before the magistrates, the appellant said: "I am not guilty. I reserve my defence."

The material portions of the evidence and of the summing-up appear fully in the judgment.

Linton Thorp, K.C. (*Gerald Dodson* with him), for the appellant:

The appellant gave evidence at the trial that he was at Wroxham on June 29, 1933, which was the date of the second alleged offence. In his summing-up the Judge commented adversely on the fact that when he was before

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the magistrates the appellant did not disclose the fact that he was at Wroxham on that date. Such a comment should not have been made, having regard to the terms of section 12 of the Criminal Justice Act, 1925, and was in conflict with the decision of this Court in NAYLOR (23 Cr. App. R. 177; (1933) 1 K. B. 685). That case was distinguished in PARKER (*ante*, p. 1; (1933) 1 K. B. 850), where it was held that the comment was proper, but only on account of the special circumstances that of three prisoners charged two had disclosed their defences at the police court and the third had not. Further, in the present case, the comment was not warranted in fact. There was some doubt whether the defence of *alibi* had in fact been disclosed by the appellant's solicitor in the course of his address to the magistrates. Also it appears that notice of certain additional evidence, which was not given at the trial, was served upon the appellant with a view to rebutting the defence of *alibi* with regard to June 29. [He referred also to HUMPHRIES (1903), 67 J. P. 396.]

Gerald Howard, for the Crown:

It is not right to say that in no circumstances may a Judge comment on the failure of an accused person to disclose his defence prior to the trial. The question is whether such comment is to be regarded as improper, in the sense that the jury are invited to infer that the non-disclosure of the defence is some evidence against the prisoner or corroboration of some evidence against him. In NAYLOR (*supra*) the comments were such as to invite the jury to infer that the failure to disclose the defence before the magistrates might be treated as some corroboration of the evidence of an accomplice. It is to be observed too that the words used in PARKER (*supra*) were similar to those used in the present case and went further than they need have gone if their sole object was to distinguish between the cases of the three prisoners. The additional evidence in the present case was procured not with a view to rebutting

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the defence of *alibi* but with a view to strengthening the evidence for the prosecution, if necessary.

Linton Thorp, K.C., replied.

THE LORD CHIEF JUSTICE [after referring to the terms of the indictment and the facts as summarised above:] The summing-up, which was a very careful one, contained a passage on which great stress has been laid on behalf of the appellant. Having referred to the defence of *alibi*, the learned Judge observed that it was unfortunate that the appellant did not say then and there—that is to say, when charged and when asked by the magistrate before being committed for trial if he desired to give evidence on his own behalf or to call witnesses—that he was at Wroxham on June 29. The learned Judge proceeded to say: "If he says it then and there, it gives the police, or those who are conducting the prosecution, an opportunity of making their own enquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying 'I reserve my defence,' of course, he deprives the prosecution of any opportunity of testing that statement." In other words, the fact that that statement was not made before the magistrates was not treated as evidence against the appellant, but was used by way of observation on the defence of *alibi* which was set up at the trial. Mr. Linton Thorp has urged that there was here a misdirection, inasmuch as there was a comment in the summing-up on the failure to disclose the defence of *alibi* at an earlier stage. Reference was also made to questions put by the Judge to the appellant at the conclusion of his cross-examination. The transcript reads as follows: "*Q.* When you were asked after all the evidence had been given if you had anything to say in answer to the charge, why did not you then say to the magistrates that you were at Wroxham on June 29 and could prove it? *A.* Well, I believe I heard my solicitor say

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that he could prove where the defendant was on June 29. *Q.* Never mind what your solicitor said. I am asking why you did not say it when you were asked what you had to say in answer to the charge? *A.* Well, when I was asked if I had anything to say in answer to the charge, I simply said I was not guilty and I reserved my defence."

A further point was taken on behalf of the appellant—that notice of additional evidence was served and that that additional evidence was of such a nature as to show that the police were aware that the defence of *alibi* was going to be raised and had taken steps to meet it. That additional evidence, which was not adduced at the trial, is before the Court and we have carefully considered it. It is not by any means necessarily to be regarded as evidence to rebut an *alibi*; it may at least equally well have been evidence to support the testimony given on the part of the prosecution. Mr. Howard has told us that the evidence was not obtained for the purpose of rebutting an *alibi* and that it was not offered, because it was not thought to be necessary. The matter is perhaps a little unsatisfactory, but, after careful consideration, we do not think that there is any real substance in this point.

The real point urged on behalf of the appellant is that the Judge was wrong in making observations upon the fact that the defence of *alibi* had not been disclosed before the magistrates, and our attention has been directed to NAYLOR (*supra*). It is important to observe that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. It is important to remember that the judgment in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a Judge

may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an *alibi*, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.

It is apparent that in NAYLOR (*supra*) the attention of the Court was directed to MORAN (1909), 3 Cr. App. R. 25, where the headnote, going a little beyond what was said in the judgment, is as follows: "The defence of an *alibi* ought to be set up at the earliest possible moment, and ought to include a statement where the defendant was at the time charged." The following observation by the Lord Chief Justice occurs at p. 26: "[The applicant] had, at the police court, a full opportunity of saying where he was. It is very unfortunate that he kept back this *alibi* until the trial." In that case there was an application to call a witness on the appeal to prove an *alibi* and that application was refused, the Court saying that it was impossible to re-open the case.

We are not seeking to lay down, nor would it be useful to lay down, any general proposition either with regard to the defence of *alibi* or with regard to the disclosure of defences. The question which we have to consider is a much more limited one—whether it is a misdirection for a Judge to say that failure to disclose an *alibi* in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence. The Judge in the present case, having made the observations to which I have referred, went on to say: "It is only if you are satisfied by the evidence looked at as a whole that this offence is brought home to the defendant, and you are satisfied that there is in this case some corroboration of the girl's story, that you are

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justified in convicting: if you are not satisfied of that and entertain any reasonable doubt about it, your duty is to acquit him." We have very carefully considered the whole matter and the various cases to which our attention has been directed and we do not think that what was said in the summing-up amounted to a misdirection. No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case, but we do not assent to the general proposition that in no circumstances may comment be made upon the failure to disclose the defence in the police court. The observations of the Court in NAYLOR (*supra*) were never intended to go to that length. There is a great difference between making the comment that silence on the part of the prisoner is unfortunate and a matter to be regarded with reference to the weight of the defence, when the defence of *alibi* is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice.

Looking at this summing-up, we are not prepared to say that there was any misdirection on the part of the Judge. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors for appellant: Daynes, Keefe & Durrant, Norwich.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

WILLIAM HENRY CARR.

1934.
9 *July.*

Indictment—Driving motor vehicle when under influence of drink—Use of word "drunk" to be avoided—Charge not to be tried together with charge of manslaughter—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 15, *sub-s.* 1 (*b*).

An indictment for the offence of driving a motor vehicle when under the influence of drink, contrary to section 15, sub-section 1 (b) of the Road Traffic Act, 1930, should avoid the use of the word "drunk."

A charge of the above offence should not be tried together with a charge of manslaughter, even though counsel for the defence consent to such a course being taken.

STRINGER (*ante*, p. 30; (1933) 1 K. B. 704) followed.

Appeal against conviction (on certificate).

The appellant was convicted at Liverpool Assizes on June 12, 1934, of manslaughter, and was sentenced by Goddard, J., to six months' imprisonment in the Second Division. He was also disqualified for holding a driving licence for three years.

The indictment was in the following terms. First count. Statement of offence: Manslaughter. Particulars of offence: William Henry Carr on the third day of May, 1934, at the parish of Cummersdale, in the county of Cumberland, unlawfully killed George Postlethwaite Carter Taylor. Second count. Statement of offence: Drunk in charge of a motor lorry, contrary to section 15, sub-section 1 (b) of the Road Traffic Act, 1930. Particulars of offence: William Henry Carr on the third day of May, 1934, at the parish aforesaid, in the county afore-

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said, drove a motor lorry in a certain public place, called the Wigton Road, under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle. The appellant was found guilty on the first count, and not guilty on the second count.

The following summary of the facts, which to a great extent were not in dispute, is taken from the judgment. The appellant was the driver of a motor lorry, and came into violent collision with a motor-car which was being driven in the opposite direction, about one mile from Carlisle. One of the results of the collision was that a man named Taylor was killed. The collision took place when the lorry, which was being driven by the appellant, was on the wrong side of the road at a point about half way along a straight stretch of road extending for about 900 yards.

Goddard, J., granted a certificate upon the following grounds: "The verdict was not wholly satisfactory in that it appeared to have an element of compromise about it. The prosecution throughout based their case on drink being the cause of the accident; the defence was, as usual, based on dazzling headlights. I reminded the jury that the prosecution had put forward drink as the sole explanation and told them that, though they could convict if they found culpable negligence apart from drink, yet if they found that the prisoner was sober they might well consider that the prisoner's story might be true, as there was no other explanation as to why he should have been on the wrong side of the road; if they did, they ought to acquit him."

J. C. Jackson, K.C. (*Glynn Blackledge* with him), for the appellant:

The real issue at the trial, according to the case for the prosecution, was whether the appellant was under the influence of drink. This was accepted throughout the trial

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by everyone concerned in the case as the substantial issue. The jury, by their verdict, negatived that charge, and, apart from the question of drink, the only evidence against the appellant was that he drove at night on the wrong side of the road. The Judge directed the jury on the question of manslaughter, but the direction did not refer to BATEMAN (1925) 19 Cr. App. R. 8, and did not lay down the test quite so clearly as it was expressed in that case. The substantial complaint, however, against the summing-up is that the jury were never directed as to the onus of proof.

Pritchard, for the Crown:

It is true that the question of drink was the main issue, but the prosecution did not rest their case wholly on that. [He referred to several matters which might be regarded as evidence of negligence to support the charge of manslaughter, apart from the question of drink.]

THE LORD CHIEF JUSTICE [after referring to the terms of the indictment and the facts of the case:] Unfortunately, the trial was in various ways unsatisfactory. The Judge expressed the view that the verdict was not wholly satisfactory in that it appeared to have the elements of a compromise. It is well to repeat that the mere fact that the presiding Judge thinks that the trial was unsatisfactory is not in itself a sufficient ground for allowing an appeal. This Court has the duty of considering whether in fact the trial was so unsatisfactory that the verdict cannot stand. Here the appellant was charged on an indictment containing two counts. [His Lordship referred to their terms as set out above.] With regard to the second count, when one looks at section 15, sub-section 1 (b) of the Road Traffic Act, 1930, it is apparent that the word "drunk" does not occur therein. Some confusion clearly arose from the fact that the charge was framed in that way. The appellant was charged in the presence and hearing of the jury with having been drunk in charge of a motor lorry

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on May 3, 1934. More than that, contrary to the express view of this Court in STRINGER (*ante*, at p. 38; (1933) 1 K. B. 704)—a case which was argued before five Judges—these two charges, one a charge of manslaughter and the other a charge under the Road Traffic Act, 1930, which was wrongly stated, with the result that the second count was bad on its face, were tried together. In STRINGER (*supra*), with reference to charges of manslaughter and dangerous driving, this Court expressed the following view: "If the two charges are to be made, the proper practice is, in our view, that there should be two separate indictments, and if that course is followed the confusion which may conceivably have arisen here will be avoided." Confusion arose in the present case also, and it is not sufficient that there was no objection on the part of the counsel for the prisoner to these two charges being tried together. No one can read this very careful summing-up without perceiving that the charge of manslaughter and the charge of driving in contravention of section 15, subsection 1 (b) of the Road Traffic Act, 1930, are curiously blended throughout. [His Lordship referred to certain passages in the summing-up and to the terms of the Judge's certificate for appeal.]

Unfortunately, although in many passages of this careful summing-up the law relating to manslaughter was carefully and accurately stated, nowhere does it appear that the jury were warned in express terms that if, upon consideration of the whole of the evidence, they were not satisfied that the prosecution had made out their case, or if they were left in any doubt, it was their duty to acquit the prisoner. The framework of the summing-up and indeed of the case as conducted throughout was on the one hand that the appellant was incapable by reason of drink and on the other hand that he was dazzled by the lights of an on-coming car. There was a third possibility that, although he was not rendered incapable by drink and was not

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dazzled by any lights, he drove so recklessly as to be guilty of manslaughter. It does not appear that that third possibility was ever plainly put or that the jury were directed upon it. In view especially of the fact that the jury were not told—and in this case it was essential that they should have been told—that the burden of proof rested on the prosecution and that if the evidence left them in doubt it was their duty to acquit, we have come to the conclusion after careful consideration that this trial was unsatisfactory and that the appeal ought to be allowed. The conviction will, therefore, be quashed.

It should be added that it is highly desirable that an indictment which is intended to charge an accused person with driving a motor vehicle when under the influence of drink to such an extent as to be incapable of having proper control should avoid the word "drunk," which section 15 of the Road Traffic Act, 1930, is careful to avoid.

Conviction quashed.

Solicitors for appellant: Marris & Shepherd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACKINNON.

1934.
16 *July.*

JOSEPH WALDMAN.

Evidence—Receiving Stolen Goods—Character put in issue—Cross-examination as to previous acquittal—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

An appellant charged with receiving property knowing it to be stolen had put his character in issue and was asked in cross-examination about a previous conviction and a previous acquittal for the same offence.

Held, the case differed from MAXWELL (1934), *ante*, p. 152, where there was no suggestion that the appellant had ever been convicted, and the conviction must be upheld.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 1, 1934, on a charge of receiving goods worth £350 knowing them to have been stolen, and was sentenced by the Commissioner to twelve months' imprisonment.

The appellant in his evidence at the trial stated that he had bought the goods, which included articles of jewellery, on sale or return from a person whom he believed to be an honest business man, though he had since discovered that the person was a receiver of stolen property. A witness called for the defence said that he had known the appellant for twelve years and that the appellant bore a good reputation for honesty. Thereupon counsel for the prosecution put the following question to the witness in cross-examination: "Would you be surprised to hear that [the appellant] has actually been convicted of receiving and charged afterwards with receiving, but acquitted?" Later at the request of the prosecution the

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appellant was recalled, and admitted that he had been convicted of receiving stolen goods in 1920 and bound over, and that two years later, at the Middlesex Sessions, he had again been charged with receiving stolen property, but had been acquitted.

St. John Hutchinson, for the appellant:

It was true the prosecution were entitled, as the appellant's character was in issue, to ask if he had been convicted, but nevertheless the case fell within the ruling of the House of Lords in MAXWELL (1934), *ante*, p. 152. In fact it was a stronger case than MAXWELL (*supra*), because where there was a conviction and then an acquittal the minds of the jury were more likely to be prejudiced than if there had been no conviction but only an acquittal. It is not possible to say what effect the cross-examination as to the acquittal had upon the jury, but following upon the judgment of the Court of Criminal Appeal in MORRISSEY (1932), 23 Cr. App. R., at p. 190, and the judgment of the Lord Chancellor in MAXWELL (*supra*), it is submitted that the proviso to the Criminal Appeal Act, 1907, s. 4 ought not to be applied in the present case.

Christmas Humphreys, for the Crown:

The prosecution were entitled to ask the questions asked at the trial, because a man who had been previously convicted and then previously acquitted of receiving stolen goods was obviously a man who should be most careful about the reception of property which was outside the scope of his normal business. This was a charge of receiving stolen property, in which the issue was one of *mens rea*, and upon this issue it was permissible to ask the appellant, once his character was in issue, any question which tended to prove the necessary *mens rea*. To this end not only were questions relating to previous convictions admissible, but also questions relating to other cases in which stolen

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property had been found on the appellant's premises, whether or not such circumstances had led to a conviction. In other words, the questions were admissible, not so much to attack the appellant's character as to prove the required *mens rea*. These facts distinguished the case from MAXWELL (*supra*). Maxwell had no previous convictions, and the suggestion made against him was that his character was bad because he had been previously acquitted on a similar charge. In the present case there was very strong evidence against the appellant, and the question of the admissibility of evidence about his previous acquittal was really a minor point. Therefore, even if the Court regard such a question as inadmissible, this is essentially a case where the proviso should be applied.

AVORY, J.: This appellant was convicted at the Central Criminal Court of receiving stolen property knowing it to have been stolen, and was sentenced to twelve months' imprisonment. He now appeals against that conviction on the ground that the Judge misdirected himself in law, in that he allowed counsel for the prosecution to cross-examine as to a previous charge of receiving stolen goods, being a charge upon which the appellant was acquitted; and, secondly, on the ground that the Judge did not fully or adequately deal with the evidence before him, in that he did not direct the jury that the evidence of the charge on which the appellant was acquitted ought never to have been adduced, and that the jury were bound to assume that the charge was unfounded.

As the case has been argued in this Court, there are two questions to be decided: first, whether the question which was put in cross-examination as to the previous acquittal of the appellant on a charge of receiving stolen property was or was not admissible; and, secondly, assuming that it was not admissible, whether, in the circumstances of this particular case, this Court ought to apply the proviso to

section 4 of the Criminal Appeal Act, 1907—in other words whether the evidence in the case was such that in the opinion of this Court the jury must inevitably have come to the conclusion that the appellant was guilty, even if the question had not been put. Now upon the first point—whether or not the question was admissible—it is to be observed that there is a not unimportant distinction between this case and the case of MAXWELL (*supra*), which was the subject of the judgment in the House of Lords. In the present case the appellant put his character in issue, and not only himself put it in issue, but called a witness to testify as to his good character. That witness was asked whether in fact the appellant had been convicted of the offence of receiving stolen goods in 1920, and the appellant himself had to admit that he had been convicted in 1920 of receiving. Both the appellant and this witness were also asked about a charge made two years later against the appellant for a similar offence of receiving stolen property, on which occasion he had been acquitted. In MAXWELL (*supra*) there was no suggestion that the appellant had ever been convicted at all, and whether the House of Lords would have decided the question in the same way as they did if they had had to deal with a case where a man had been previously convicted and had also been asked whether he had been previously acquitted may be open to doubt. It is not necessary for this Court to consider what the decision of the House of Lords would have been in such a case. It is not necessary either to consider or to express an opinion on the point which Mr. Christmas Humphreys has taken, that, in a case where the charge is one of receiving, the admissibility of a question as to a previous acquittal may be relevant. We do not express any opinion on the point, although it may be one worthy of consideration. The charge of receiving stands on an exceptional footing in that it is one of the few charges in which the prosecution, for the purpose of proving the guilty

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knowledge of the accused, are allowed to give evidence of a previous conviction within the last five years and of other stolen property being found within twelve months on the premises of the accused. No doubt also there is much to be said for making a distinction between a charge of receiving stolen goods and a charge such as that with which the House of Lords dealt in MAXWELL (*supra*).

We come now to the point whether, even assuming that questions as to the previous acquittal ought not to have been put, this is a case where the Court ought to apply the proviso to section 4 of the Criminal Appeal Act, 1907 The rule which has been established is that on an appeal on the ground of misreception of evidence the proviso cannot operate, unless the evidence is of such a nature and the circumstances of the case are such that the jury must have returned the same verdict, even if the evidence had not been given. The Lord Chancellor said in MAXWELL (*supra*) that the appellant had brought himself within this rule, and that on the facts the Court could not say that the jury must inevitably have found the same verdict. On that part of the case the Lord Chancellor concludes his opinion by saying: "It may well be that the fact that he had been charged some years before with a similar offence, although the charge led to an acquittal, may have been the last ounce which turned the scale against him." We are satisfied that in the present case the question about the previous acquittal could not have turned the scale against the appellant by one pennyweight or one dram, much less by an ounce. Therefore we are satisfied that we ought to apply the proviso and say that this appeal should be dismissed.

Appeal dismissed.

Solicitors—for the appellant, Pengelly & Co.; for the Crown, Wontner & Sons.

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